TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 248

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MARCH 19, 1923

(29,461)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1923

[fol. 1] **COURT OF CLAIMS**

No. 33955

THE ILLINOIS CENTRAL RAILROAD COMPANY

vs.

THE UNITED STATES

I. PETITION AND AMENDED PETITION

On March 23, 1918, the plaintiff filed its original petition.

Subsequently, to wit, on November 12, 1921, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed Nov. 12, 1921

Petitioner by leave of court this, its amended petition, and says:

I

Petitioner is a corporation organized under the laws of the State of Illinois. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Illinois, Indiana, Iowa, Nebraska, Kentucky, Tennessee, Mississippi and Louisiana.

II

Three of petitioner's railway lines, extending respectively (1) from Chicago to Cairo, both in the State of Illinois, (2) from Centralia to East Dubuque, both in Illinois, and (3) from Dubuque to Sioux City, both in the State of Iowa, were constructed with aid of public lands granted by Congress (acts approved September 20, 1850, May 15, 1856, June 2, 1864, and March 2, 1868). Each of the grants so received contained the following provision:

"Said railroad and branches shall be and remain a public highway, for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States." (9 Stats. L. p. 63.)

III

[fol. 2] By legislation of Congress and judicial proceedings all antecedent to the matters hereinafter narrated, it was fixed that for transportation of property of the United States on railroads constructed with the aid of such land-grants there should be paid fifty (50) per cent of the ordinary rates established for transportation of the property of private owners; and by agreements between the

United States and the railroad companies operating such land-aided lines, which were in effect at the times hereinafter narrated, the lowest rate that would be afforded upon any line through such a grant was made applicable to all other and competing lines between the same terminal points.

IV

In the years 1909 to 1916 inclusive there occurred frequently upon said land-aided railways operated by petitioner shipments of property belonging to private owners, consigned to officers of agents of the United States. In such shipments there were used bills of lading, made up by the consignors, which were on forms that had been prepared by officers of the United States and for its use, and therefore were known in railway offices as "Government bills of lading;" which forms had been furnished to the consignors by the officer of the United States having authority over transportation of its property. Details of said shipments, and of payments made to claimants therefor, are set out in bills of particulars filed herewith.

V

In some cases the commodities or articles so transported were for use, as materials or supplies, in authorized public improvements constructed by the United States and in other cases the matter trans-
[fol. 3] ported was coal for uses of the United States army. Offers had been invited and had been accepted by authorized officers of the United States. In invitations bidders were directed to submit prices both for delivery both on cars at points of shipment and at final destinations, and the explanation was given that it was desired, by the apparent acceptance of delivery at points of shipment, to obtain for the Government the benefit of land-grant freight rates. The bids so obtained and accepted named, for delivery at points of shipment, prices less by the amounts of the ordinary freight charges than the rates named for delivery at destinations. In the contracts which followed the offer- for delivery at point of shipment were accepted, and it was provided (1) that the freight charges and all other obligations, and all risks in the shipments should be borne, and the unloading and handling at destinations done, by the contractors; (2) that the materials should not be accepted and paid for until they had been inspected at final destinations and accepted by officers of agents of the United States and (3) that such materials as, upon such inspection, should be rejected would be removed from the site of the work, or of the inspection by, or at the expense of, the contractors. These provisions were observed in the dealings of the officers of the United States with the contractors for, and payment for the transportation was made to claimant at land-grant rates; and thus the United States profited to the extent of the difference between those rates and the ordinary tariff rates which would necessarily have been paid if the materials had been transported as property of the contractors.

The amount of said abatements made from petitioner's compensa-
[fol. 4] tion is forty thousand dollars ($40,000.00).

VI

The freight charges for said shipments were paid to claimant by disbursing officers of the United States. In receiving and transporting said freights and when receiving said payments petitioner's officers believed that the freights belonged to the United States.

Petitioner prays judgment against the United States in said sum of forty thousand dollars ($40,000.00); no part of the same having been paid and its claim to the same not having been assigned wholly or in part.

The Illinois Central Railroad Company, By Benj. Carter, Its Attorney in Fact.

DISTRICT OF COLUMBIA, ss:

Before me, Chas. H. Ruoff, a notary public in and for said District, appeared Benj. Carter, subscriber to the foregoing petition, who being by me sworn, makes oath and says that the allegations of said petition are true to the best of his knowledge, information and belief.

Benj. Carter.

Subscribed and sworn to before me on this 22d day of September, 1921.

Chas. H. Ruoff, Notary Public.

[fol. 5] IN THE COURT OF CLAIMS

III. GENERAL TRAVERSE

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IN THE COURT OF CLAIMS

IV. ARGUMENT AND SUBMISSION OF CASE

On March 20, 1922, this case was submitted on merits by Mr. Benjamin Carter, for the plaintiff, and Mr. Perry W. Howard, for the defendant, on the arguments, made this day, in the case of Louisville and Nashville Railroad Company vs. United States, No. 33239.

[fol. 6] IN THE COURT OF CLAIMS

V. FINDINGS OF FACT, CONCLUSION OF LAW, MEMORANDUM BY THE COURT, AND APPENDICES A, B, C, AND D—Entered May 1, 1922.

This case having been heard by the Court of Claims, the Court, upon the evidence, makes the following

FINDINGS OF FACT

I.

The plaintiff is, and was during the different transactions hereinafter described, a corporation duly incorporated under the laws of the State of Illinois, engaged in the operation of a system of railways in the States of Illinois, Indiana, Iowa, Nebraska, Kentucky, Tennessee, Mississippi, and Louisiana.

II

Three of plaintiff's lines of railway, (1) from Chicago to Cairo, (2) from Centralia to East Dubuque, all in the State of Illinois, and (3) from Dubuque to Sioux City, both in the State of Iowa, were constructed with the aid of public lands granted by Congress (acts of September 20, 1850, 9 Stat. 466; May 15, 1856, 11 Stat. 9; June 2, 1864, 13 Stat. 95, 98; March 2, 1868, 15 Stat. 38).

III

In the year 1914 a contract was entered into between Major G. M. Hoffman, of the Corps of Engineers, and the Chicago & Carterville Coal Company to furnish coal for river improvements in the vicinity of Dubuque, Iowa, and the coal was shipped during that year from Herrin to Dubuque. During the same year a contract was made by Major Hoffman with the Collieries Sales Company, under which shipments of coal for the same purpose were made during that year from Eldorado to Dubuque, and in 1915 and 1916 Major Hoffman made two contracts, one in each year, with Rutledge & Taylor Coal Company for coal for the same purpose which was shipped during 1915 and 1916 from Duquoin to Dubuque.

[fol. 7] None of the above contracts has been introduced in evidence. Certain extracts from the specifications and proposals to furnish coal and acceptances thereof found in the record are attached to these findings as Appendix A, and are made part thereof by reference thereto.

IV

The coal was delivered under the four contracts described above on board cars at the different mines, and was shipped over plaintiff's lines therefrom to Dubuque on Government bills of lading furnished

to said coal companies by the Government, which were duly accomplished, the coal inspected and accepted at that place by the proper Government officials. The total land-grant deductions on such shipments made by the plaintiff in stating its bills amounted to $5,234.61.

V

During the years 1911, 1912, 1913, and 1915 numerous shipments of materials and supplies, such as coal, stone, lumber, hardware, and other articles for use in Government improvements of the Missouri River, were made over plaintiff's lines from Athens, Marissa, Winkle, Freeburg, Belleville, New National Mine, Mulberry Hill, Lenzburg, Herrin, Chicago, and Chicago Heights, in the State of Illinois; East Sioux Falls and Rowena, in the State of South Dakota; St. Louis, Missouri; Hattiesburg, Mississippi; and Houlton Junction, Louisiana, to Sioux City, the Narrows, and River Siding, Iowa, and Omaha, Nebraska. These materials and supplies were all purchased on invitation to bidders, proposals of bidders, and vouchers, on which payments were made to the sellers. The form of invitation on which bids were made invariably read: "The prices will be for the articles delivered f. o. b. cars at ——. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any responsibilities as shipper that would attach if the delivery had been at destination." This form of invitation was only used over land-grant or bond-aided roads, and was never used where delivery was to be made at point of use.

The shipments were all made on Government bills of lading, which were accomplished, the articles inspected, and accepted at points of use by the proper Government officials. The total land-grant deductions on such shipments made by the plaintiff in stating its bills amounted to $9,695.27.

The Government official, examined as to the purchase of the above articles, produced the form of invitation quoted—one bid and one voucher, upon which payment was made. The bids and voucher were not introduced in evidence. All the rest of the invitations, bids, and vouchers were destroyed, according to the practice of the office, after three years.

VI

Land-grant deductions on some of the shipments described in finding V were made from October 30, 1911, to March 7, 1912, both fol. 8] dates inclusive, amounting to $2,511.68, and were all made more than six years prior to the filing of this suit on March 23, 1918.

VII

On June 3, 1914, the Government, through Lieut. Col. Judson, Corps of Engineers, entered into a contract with the Lumber Manu-

facturers' Agency of Centralia, Lewis County, Washington, for 888,720 feet b. m., more or less, Oregon or Washington fir timber, for breakwater repairs in the Chicago, Illinois, district, to be delivered on board cars at the company's mills, and to be inspected, both at the mills and the point of delivery, before acceptance and payment.

On August 5, 1914, the Government, through Major Cavenaugh, Corps of Engineers, entered into a contract with the Union Lumber Company, of Union Mills, Thurston County, Washington, for 2,793,180 feet b. m., more or less, for timber to be delivered on board cars at the company's mills, the timber to be used for constructing part of the exterior breakwater at Chicago, Illinois.

Inspections were to be made at the company's mills and final inspection at point of delivery before acceptance and payment. The deliveries were made as required by the two contracts, and timber was all inspected at the mills and afterwards at Chicago, and was accepted and paid for in accordance with certificates of the Engineer officer in charge of the work.

The shipments were made from Winlock, Walville, Napavine, Vader, Pe Ell, Bordeaux, Chehalie, Centralia, Hartford, Rainer, Littell, and Union Mills, State of Washington, to East Chicago, Illinois, and were partly over plaintiff's lines, and were made on Government bills of lading. The total land-grant deductions for shipments over plaintiff's lines made by the plaintiff in stating its bills amounted to $9,340.18.

The contracts are attached to these findings as Appendix B, and are made part hereof by reference thereto.

VIII

On August 15, 1916, the Government advertised for sealed proposals to furnish and deliver cement for use on revetment work on the Mississippi River at Vicksburg, Mississippi. The specifications furnished to prospective bidders stated that proposals would be considered for delivery f. o. b. cars at point of manufacture, and f. o. b. cars on the Government warehouse switch at Vicksburg, Mississippi. The Carolina Portland Cement Company of New Orleans, on August 26, 1906, proposed to furnish 10,000 barrels at $1.44½ per barrel, f. o. b. cars point of manufacture, Leeds, Alabama, or f. o. b. cars at Vicksburg, at $1.90 per barrel. The proposal was accepted at $1.44½ per barrel, f. o. b. cars, Leeds, Ala. The cement was shipped in 1916 over plaintiff's lines to Vicksburg on Government bills of lading, which were accomplished, and the cement tested and accepted by the proper Government officials. The total land-grant deductions on such shipments made by the plaintiff in stating its bills amounted to $251.24.

The advertisement, proposal, and acceptance are attached to these findings as Appendix C and are made part hereof by reference hereto.

[fol. 9]

IX

On August 7, 1915, Major Markham, of the Corps of Engineers in charge of certain Government work on the Mississippi River, with headquarters at Memphis, Tennessee, wrote to the Bucyrus Company of South Milwaukee, Wisconsin, inviting a proposal to furnish and install a concrete mat revetment plant. On September 8, 1915, the said company proposed to deliver the plant at South Milwaukee in fourteen weeks from date of order for $9,500.00, or to deliver same at South Milwaukee in ten weeks from date of order for $9,775.00, and to put up and install said plant at Memphis, and furnish an operator for two weeks, for $1,175.00 additional. On September 13, 1915, the proposal of said company was accepted for delivery at South Milwaukee in ten weeks, with certain changes of price and construction which appear to have been accepted. The plant was shipped over plaintiff's lines to Memphis on two Government bills of lading, which were duly accomplished, the plant erected, and after proper tests, paid for by the Government. The land-grant deduction made by the plaintiff in stating its bills amounted to $81.74.

The proposal (citing the invitation to bid), the acceptance, and the voucher showing payment are attached to the findings as Appendix D, and made part hereof.

X

On June 5, 1914, Richard E. Egglebrecht, of St. Louis, Missouri, entered into a contract with the United States, through Capt. F. G. Stritzinger, of the Quartermaster Corps, to furnish and deliver by June 30, 1915, free on board cars at Carterville, Illinois, 13,500 tons of coal, to be paid for after delivery, at Omaha, at the rate of $1.56 per long ton.

On June 1, 1916, the Nebraska Fuel Company entered into a contract with the Government, through Col. G. S. Bingham, of the Quartermaster Corps, to deliver free on board cars at Duquoin, Illinois, coal in such quantities and at such times as might be required by the receiving officer or agent of the Quartermaster Corps. Payment to be made at Omaha, Nebraska, at the rate of $1.739 per short ton, which included the cost of unloading and storing in bins.

The coal furnished under said contracts were shipped from Carterville and Duquoin over plaintiff's lines to Omaha, Nebraska, on Government bills of lading, which were duly accomplished, and the coal inspected and accepted at that place by the proper Government officials. On said shipments land-grant deductions of $159.29 were made by the plaintiff in stating its bills.

The two contracts and material parts of the specifications are attached to these findings as Appendix E, and are made part hereof by reference thereto.

XI

The plaintiff's bills were presented to the Government for payment of the net freight for the transportation of said coal and other

articles after the proper land-grant deductions had been made by the plaintiff in stating its bills and payment was made to the plaintiff of the full amount claimed on that basis and accepted without protest.

[fol. 10]

XII

It is not shown whether the plaintiff, when said freights were received and transported and when its bills were rendered and payment received, was or was not informed of the conditions of the contracts or orders with reference to inspection and acceptance or rejection at point of destination or when, if thereafter, it was so informed.

XIII

The Government form of bills of lading used in the transportation of the articles in question provided on its face for the hauling of Government property only, and the directions on the back of the same limited their use to Government property. The agreement on the back of the same between the United States and the carrier stipulated that prepayment of charges should in no case be demanded by the carrier, nor should collection be made from the consignee; that on presentation to the office indicated on the face of the bill of lading properly accomplished, attached to freight voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; that the shipment was to be made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate would be available unless otherwise indicated on the face of the bill of lading.

Conclusion of Law

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be and it is dismissed with judgment against the plaintiff for cost of printing the record to be taxed by the clerk.

[fol. 11]

In the Court of Claims

Memorandum

All the transportation here involved was of supplies purchased under contracts or orders providing for delivery f. o. b. cars at mine or factory. That the United States and its contractors, having seen fit to so contract, also saw fit to provide for a final inspection at place of delivery, with incidental right of rejection, or for some further service to be rendered by the contractor at that point, either for the original or an additional compensation, are matters of no concern to the railroad company unless they are entitled to assert that, be-

cause thereof the shipments were not shipments of "Government property" and hence not entitled to land-grant rates. Such a contention is not tenable. The United States and the contractors were privileged to write into their contract such terms as they saw fit and a third party, even though incidentally interested as a carrier, may not give an effect to one provision other than that plainly intended by the parties because the parties themselves saw fit to agree to other terms regarded by it as inconsistent therewith. Provisions for a final inspection at point of delivery or for the rendering of a further service by the contractor at that point were not inconsistent with and could not be invoked to nullify a specific provision under which the title to the property passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable.

In rendering its bills the plaintiff itself made land-grant deductions from commercial rates, claimed only the land-grant rate resultant from such deductions, and accepted payment thereof without protest. It is thus estopped to assert a further claim for the same service except upon a showing of fraud or mistake of fact. There is no proof that the plaintiff was in any way deceived or mistaken as to the facts or was not fully informed with reference thereto when it rendered the service, presented its bills, and received payment thereof. B. & O. Case, 52 C. Cls. 468; Oregon-Wash. Case, 54 C. Cls. 131, affirmed 255 U. S. 339.

Part of the claim presented, amounting to $2,511,68, relating to shipments from October 30, 1911, to March 7, 1912, was barred by the statue of limitations when this suit was commenced, March, 23, 1918.

[fol. 12] APPENDIX A TO FINDINGS

U. S. Engineer Office,
Rock Island, Ill., March 3, 1914.

IV. Reservations

* * * * * * *

V. Description of Coal Desired

* * * * * * *

VII. Delivery

13. The successful bidder or bidders will be required to deliver all the coal covered by this proposal f. o. b. cars at mines on or before March 31, 1914.

VIII. Sampling—Analysis

14. If desired by the successful bidder, permission will be given to him or his representative to be present and witness the collection and preparation of the samples to be forwarded to the Government laboratory.

15. The coal will be sampled at the time it is being loaded or unloaded from railroad cars, barges, or wagons, or as soon thereafter as possible. The samples taken will in no case be less than the total of one hundred (100) pounds per carload, to be selected proportionately from the lumps and fine coal and from different parts of each carload contained in each delivery, in such a manner as will in every respect truly represent the quality of coal delivered.

* * * * * * *

IX. Causes for Rejection

* * * * * * *

X. Price and Payment

20. Payment will be made promptly upon receipt of a report from the laboratory on the quality of the coal under consideration. The laboratory will furnish such report in not more than fifteen (15) days after receipt of the last sample or samples.

* * * * * * *

(m) Total quantity to be delivered under this proposed 7,000 tons (more or less). Price per ton of 2,000 pounds (this price is understood to be the bid price per ton, see paragraph 20 for method of determining price for delivered coal): $1.35 mines, 7,000; $9,450 total.

[fol. 13] Note.—Bids will be considered on less than the quantity specified (7,000 tons), and bidders who desired to submit prices on a less quantity should state hereon the quantity they propose to furnish at the price quoted.

To Major G. M. Hoffman,
Corps of Engineers, U. S. Army:

The undersigned hereby propose to furnish the coal as above specified, and at the price stated above, subject to all the conditions of the specifications and proposal, and deliver same f. o. b. cars at the originating point or points above designated on or before March 31, 1914.

The undersigned has read the specifications and proposal and agrees to comply therewith in every particular.

Signature: Chicago & Carterville Coal Co. W. H. Hill, Vice Pres. (E. S. A.)

Place of business: 640 Old Colony Building, Chicago, Ill.

U. S. Engineer Office,
Rock Island, Ill., March 10, 1914.

Chicago & Carterville Coal Co.
Old Colony Building, Chicago, Illinois.

GENTLEMEN:

Your proposal, opened at 11 a. m., March 9th, for furnishing 7,000 tons, more or less, bituminous lump coal, f. o. b. mines, on or before March 31st, appears to be the most advantageous of any of the bids received, and is, therefore, accepted.

I am unable to place any immediate orders, owing to the fact that the ice has not yet gone out of the river at certain points of delivery, but you will be notified at the earliest possible moment when and how to commence shipping.

Very respectfully, G. M. Hoffman, Major, Corps of Engineers.

U. S. Engineer Office,
Rock Island, Ill., Oct. 6, 1914.

I. Proposals

1. Sealed proposals to furnish the quantity of coal specified in the schedule herewith, required for the use of U. S. forces engaged on river improvement work between mouth of Missouri River and St. Paul, Minn., etc., will be received until 11 o'clock a. m., October 9, 1914, at the office of Major G. M. Hoffmen, Corps of Engineers, U. S. A., Federal Building, Rock Island, Ill., and then opened.

* * * * * * *

(m) Total quantity to be delivered under this proposal, 2,000 tons (more or less). Price per ton of 2,000 pounds (this price is understood to be the bid price per ton, see paragraph 20 for method of determining price for delivered coal), $1.38 f. o. b. mine; $2,760, total.

[fol. 14] To Major G. M. Hoffman
Corps of Engineers, U. S. Army.

The undersigned hereby propose to furnish the coal as above specified, and at the price stated above, subject to all the conditions of the specifications and proposal, and deliver same f. o. b. cars at the originating point or points above designated as specified in Section VII, paragraph 13, hereof.

The undersigned has read the specifications and proposal and agrees to comply therewith in every particular.

Signature: Collieries Sales Co., Per J. D. Miller, V. Pres.

Place of business: 501 Best Building, Rock Island, Ill.

U. S. Engineer Office.
Rock Island, Ill., Oct. 9, 1914.

Collieries Sales Co.,
Rock Island, Ill.

Gentlemen:

1. Your proposal for furnishing approximately 2,000 tons 6" lump coal f. o. b. mines, Eldorado, Saline County, Ill., at $1.38 per ton, subject to correction for B. t. u. and ash, is accepted.

2. Inclosed herewith are Government bills of lading Nos. 17602 to 17626, inclusive, 25 in all, upon which the coal shipped by you under this agreement must be billed. Additional Government bills of lading will be issued to you as needed.

3. Commence shipment immediately as follows:

(a) Rock Island, Ill. Consignee, J. C. McElherne, U. S. asst. engineer. Routing, Ill. Central via La Salle to C. R. I. & P. Ship two fifty (50) ton cars per day until approximately 700 tons have been shipped.

(b) Moline, Ill. Consignee, J. B. Basset, U. S. asst. engineer. Routing, Ill. Central via Mendota to C., B. & Q. Ship two 50-ton cars per week until approximately 550 tons have been shipped.

4. Additional instructions concerning shipments to other points will be given you later.

Very respectfully, G. M. Hoffman, Major, Corps of Engineers.
W. T. Chambers, Purchasing Agent. WTC—JHG.

U. S. Engineer Office,
Rock Island, Ill., March 27, 1915.

I. Proposals

1. Sealed proposals to furnish the quantity of coal specified in the schedule herewith, required for the use of U. S. forces engaged on river improvement work between mouth of Missouri River and St. Paul, Minn., etc., will be received until 11 a. m. April 6, 1915, at the office of Major G. M. Hoffman, Corps of Engineers, U. S. Army, Federal Building, Rock Island, Ill., and then opened.

[fol. 15] 2. Each bidder shall have the right to be present either in person or by attorney when the bids are opened.

* * * * * * *

VII. Delivery, etc.

13. (a) The successful bidder or bidders will be required to deliver all the coal covered by this proposal f. o. b. cars at mines in quantities as required (one or more carloads to each delivery), between April 7 and Nov. 15, 1915.

(b) The coal covered by this proposal will be shipped on Government bills of lading, to be furnished by the United States to the

successful bidder, who will be required to issue same in the manner required by U. S. regulations.

(c) Certain quantities of the coal covered by this proposal (not to exceed one-fourth the total quantity) will be required to be shipped in regulation side dumping cars. Bidders are requested to state how much advance notice they will require to procure the proper cars for these shipments.

* * * * * * *

(m) Total quantity to be delivered under this proposal, 40,000 tons (more or less). Price per ton of 2,000 pounds (this price is understood to be the bid price per ton—see paragraph 20 for method of determining price for delivered coal), $1.15 per net ton of 2,000 lbs. f. o. b. mine in cars; $46,000, total.

We propose to furnish screened lump coal over 3" round-hole mesh, quantity 40,000 tons, more or less.

We can furnish side-dump equipment, Illinois Central cars, series 118,001 to 125,500 (7,493 of these in service), on ¼ of the total quantity within 24 hours after notification is received by us.

To Major G. M. Hoffman,
Corps of Engineers, U. S. Army:

The undersigned hereby propose to furnish the coal as above specified, and at the prices stated above, subject to all the conditions of the specifications and proposals, and deliver same f. o. b. cars at the originating point or points above designated in quantities as may be required between April 7 and Nov. 15, 1915.

The undersigned has read the specifications and proposal and agrees to comply therewith in every particular.

Signature: Rutledge & Taylor Coal Co. J. E. Rutledge, President.

Place of business: #922 Security Bldg., St. Louis, Mo.

* * * * * * *

U. S. Engineer Office,
Rock Island, Ill., April 9, 1915.

Rutledge & Taylor Coal Co.,
St. Louis, Mo.

Gentlemen:

1. Your proposal is accepted for furnishing 40,000 tons (more or less) 2" screened lump coal, from the Security mine, 2½ miles south of Duquoin, Perry County, Ill., shipping point Duquoin, Ill., on Illinois Central R. R., price f. o. b. cars at said shipping point, $1.15 per ton of 2,000 pounds.

[fol. 16] 2. The coal covered by your proposal and this acceptance is guaranteed by you to be of the following standard:

British thermal units per pound of "dry coal"	13,075
Percentage of ash in "dry coal"	9
Percentage of sulphur in "dry coal"	1.69
Percentage of volatile matter in "dry coal"	33
Moisture in coal "as received," per cent	7.5

And payment for same will be based on this standard, subject to analysis at U. S. Laboratory, Milan, Ill., from samples taken at destination points, as prescribed in section 10, paragraphs 20 and 21 of the specifications which form a part of your proposal.

3. All shipments under this agreement will be made on Government bills of lading, a supply of which with instructions for their issue are mailed to-day under separate cover.

Very respectfully, G. M. Hoffman, Major, Corps of Engineers.

U. S. Engineer Office,
Rock Island, Ill., June 15, 1916.

I. Proposals

1. Sealed proposals to furnish the quantity of coal specified in the schedule herewith, required for the use of U. S. forces engaged on river improvement work between mouth of Missouri River and St. Paul, Minn., etc., will be received until 11 a. m. June 30, 1916, at the office of Major G. M. Hoffman, Corps of Engineers, U. S. Army, Federal Building, Rock Island, Ill., and then opened.

2. Each bidder shall have the right to be present either in person or by attorney when the bids are opened.

* * * * * * *

VII. Delivery, etc.

15. (a) The successful bidder or bidders will be required to deliver all the coal covered by this proposal f. o. b. cars at mines in quantities as required (one or more carloads to each delivery), between July 1 and Dec. 31, 1916. Bidders are informed that 21,000 tons (more or less), of the coal covered by this contract will be ordered from the mines for shipment on or before Nov. 1, 1916; the remaining quantity of approximately 1,000 tons to be delivered as needed between Nov. 1 and Dec. 31, 1916.

(*b*) The coal covered by this proposal will be shipped on Government bills of lading, to be furnished by the United States to the successful bidder, who will be required to issue same in the manner prescribed by U. S. regulations.

* * * * * * *

(m) Total quantity to be delivered under this proposal, 1,500 tons (more or less), bituminous screenings. Price per ton of 2,000 pounds (this price is understood to be the bid price per ton, see paragraph 23 for method of determining price for delivered coal), $0.75; $1,125.00 total.

[fol. 17] To Major G. M. Hoffman,
Corps of Engineers, U. S. Army:

The undersigned hereby propose to furnish the coal as above specified, and at the prices stated above, subject to all the conditions of the specifications and proposal, and deliver same f. o. b. cars at the originating point or points above designated in quantities as may be required between July 1 and Dec. 31, 1916.

The undersigned has read the specifications and proposal and agrees to comply therewith in every particular.

Signature: Rutledge & Taylor Coal Company, By F. W. J. Sextro, O. P.

Place of business: 923 Security Building, St. Louis, Missouri.

* * * * * * *

XIV. Delivery, etc.

28. (*a*) The contractor will be required to deliver the coal to the approximate localities and in the approximate quantities between July 15 and Nov. 15, 1916, as set forth in the following table:

Approximate localities	Average miles from St. Louis	Approximate quantities	
		Tons per month	Tons (total)
Alton, Illinois, to Hannibal, Mo.	110	800	3,200
Quincy, Illinois, to Keokuk, Iowa	170	700	2,800
Keithsburg, Ill., to Rock Island, Ill.	285	700	2,800
Moline, Illinois, to Le Claire, Iowa	321	1,200	[1]4,800
Dubuque, Iowa, to Wyalusing, Wis.	436	650	[2]2,600
Genoa, Wisconsin, to La Crosse, Wis.	525	450	1,800
Winona, Minn., to Fountain City, Wis.	570	400	1,600
Prescott, Wis., to St. Paul, Minn.	661	600	2,400
Total	...	5,500	22,000

* * * * * * *

U. S. Engineer Office,
Rock Island, Ill., July 8, 1916.

Rutledge & Taylor Coal Co.,
St. Louis, Mo.

Gentlemen:

1. Your proposal is accepted for furnishing 20,500 tons (more or less) 3″ x 6″ screened egg bituminous coal at $1.24 per ton and 1,500 tons 1¼″ bituminous coal screenings at 75c per ton, both

[1] 50 tons screenings.
[2] 1,050 tons screenings.

prices being f. o. b. your Security mine 2½ miles south of Duquoin, Perry County, Ill., shipping point Duquoin, Ill., on main line of Illinois Central Railway.

2. The coal covered by your proposal and this acceptance is guaranteed by you to be of the following standards:

3" x 6" Screened Egg Bituminous Coal

British thermal units per pound of "dry coal"	13,075
Percentage of ash in "dry coal"	9%
Percentage of sulphur in "dry coal"	1.69%
Percentage of volatile matter in "dry coal"	33%
Moisture in coal "as received," per cent	7.5%

[fol. 18] 1¼" Bituminous Coal Screenings

British thermal units per pound of "dry coal"	12,500
Percentage of ash in "dry coal"	10%
Percentage of sulphur in "dry coal"	1.70%
Percentage of volatile matter in "dry coal"	35.00%
Moisture in coal "as received," per cent	9.30%

And payment for same will be based on these standards, subject to analyses at U. S. Testing Laboratory, Milan, Ill., from samples taken at destination points, as prescribed in Section X, paragraphs 22 and 23, which form a part of your proposal.

3. All shipments under this agreement will be made on Government bills of lading, which you will issue as instructed in previous agreements. Please notify this office promptly before your present supply of Government bills of lading are exhausted, so that additional ones may be sent you as needed.

Very respectfully, G. M. Hoffman, Major, Corps of Engineers.

APPENDIX B TO FINDINGS

[Form 19]

These articles of agreement entered into this third day of June, nineteen hundred fourteen, between W. V. Judson, lieut. col., Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Lumber Manufacturers' Agency, Centralia, in the county of Lewis, State of Washington, hereinafter designated as the contractor, of the second part, witnesseth that the said parties do hereby covenant and agree to and with each other as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish f. o. b. cars at mills eight hundred eighty-eight

thousand seven hundred and twenty (888,720) feet b. m., more or less, Oregon or Washington fir timber for breakwater repairs in the Chicago, Illinois, district.

The contracting officer shall pay the contractor for timber delivered, inspected, and accepted, as provided for by the specifications, at the rate of eight dollars and forty-five cents ($8.45) per M, ft. b. m.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as — not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quanity shall be final.

Article 9. Until final inspection and acceptance of and payment for all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the [fol. 19] contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

W. V. Judson, Lieut. Col., Corps of Engineers, U. S. A. Lumber Manufacturers' Agency, By J. D. Wonderly, Asst. Manager. [Seal.] Witness: S. F. Pegues. Witness: G. F. Lewis.

[Advertisement]

United States Engineer Office,
508 Federal Building,
Chicago, Ill., March 30, 1914.

Sealed proposals for furnishing fir timber for use in Chicago (Ill.) district f. o. b. cars at mills will be received at this office until 10 o'clock a. m. April 28, 1914, and then publicly opened. Information on application to this office or to United States Engineer Office, Seattle, Wash.

H. B. Ferguson, Major, Engineers.

25. Inspection.—One or more inspectors, whose services will be paid for by the United States, will be appointed by the contracting officer. Ample provision will be made for inspection at points convenient for the contractor, who shall give reasonable notice to the contracting officer or his authorized agent as to when and where inspection will be needed. The inspector shall have power to reject any materials that do not fully conform to these specifications. The contractor shall furnish, without expense to the United States, and whenever so requested by the inspector, all necessary assistance and facilities to enable him to make a complete and thorough inspection of all timber before same is loaded on cars. The inspector will be instructed as to the order of manufacture and loading, and the contractor will be required to manufacture the timber and load the cars in accordance with orders that may be given him by the inspector, and shall properly secure timber so that it may be safely trans-

ported. The necessary materials and labor for properly securing the timber shall be furnished by the contractor without additional expense to the United States, and any materials so used shall become and remain the property of the United States.

[Form 19]

1. These articles of agreement entered into this 5th day of August, nineteen hundred fourteen, between Major J. B. Cavanaugh, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Union Lumber Company, Union Mills, in the county of Thurston, State of Washington, hereinafter designated as the contractor, of the second part, witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

2. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor [fol. 20] shall furnish and deliver f. o. b. cars at Union Mills, Washington, two million seven hundred ninety-three thousand one hundred eighty (2,793,180) ft. b. m., more or less, fir lumber. That the contracting officer shall pay the contractor for the material so delivered and accepted as follows:

For 1½″ x 12″ plank, eight and -5/-00 dollars (8.25) per M ft. b. m.

For 6″ x 12″ timber, eight and 25/100 dollars ($8.25) per M ft. b. m.

For 8″ x 12″ timber, eight and 25/100 dollars ($8.25) per M ft. b. m.

For 12″ x 18″ timber, ten and 25/100 dollars ($10.25) per M ft. b. m.

Article 3. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as does not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

Article 4. The contractor shall commence the undertaking covered by this contract as set forth in paragraph — of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have power, after ten days' notice in writing to the contractor, to employ such additional plant or labor, to purchase such materials, and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any ex-

cess cost thereof, over what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided in article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

Article 5. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the prior sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the contractor; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to proceed forthwith to secure the delivery of the material, or the performance of the work, by con- [fol. 21] tract or otherwise, in accordance with law, conforming as nearly as practicable, in completing the contract to the requirements and conditions prescribed therein. Any departure from such requirements and conditions, however, shall not release the contractor or the surety or sureties of the contractor from their liability for the damages due to the contractor's default, but they shall not be responsible for any increased cost involved in such departure. Whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the United States in excess of those payable by the United States during the period herein allowed for the completion of the contract by the contractor, shall be charged to the contractor, and the United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained, as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 6. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the work out of the hands of the contractor as provided in article 4 of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers, may waive the time limit and permit the con-

tractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the original time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: Provided, however, That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under article 4 hereof in case the contractor shall fail, in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of the time limit.

[fol. 22] Article 7. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

In witness whereof the parties aforesaid have hereunto placed their signatures the date hereinbefore written.

A. L. Miller as to Union Lumber Co. M. M. Chatten, Pres. A. A. Coles as to J. B. Cavanaugh, Major, Corps of Engineers. Witness: —— ——.

[Advertisement]

U. S. Engineer Office,
Seattle, Washington, July 14, 1914.

Sealed proposals for furnishing fir timber and plank for use in Chicago, Ill., district, f. o. b. cars at mills, will be received at this office until 10 o'clock a. m. July 23, 1914, and then publicly opened. Information on application to this office or U. S. Engineer office, Chicago, Ill.

J. B. Cavanaugh, Major, Engineers.

* * * * * * *

Detailed Specifications.

1. Description of the Site and Work

17. The timber and plank herein called for is Oregon or Washington fir and is intended for use in Chicago, Ill., district. Delivery shall consist in loading the foregoing materials on board cars at mills, properly secured for shipment by railroad.

21. Freight affecting bids: All charges for transportation by railroad will be paid directly by the United States. It is intended to take advantage of the reduced freight rates accorded the United States over the land-grant and bond-aided railroads. Bidders will therefore state in the blank space provided on the form of proposal [fol. 23] hereto attached the location of mill or mills and names of railroads reaching same. In making the award the total freight rate will be considered in connection with the unit prices bid.

War Department,
United States Engineer Office,
508 Federal Building,
Chicago, Ill., October 19, 1914.

I hereby certify that between the 19th of August and the 10th of October, 1914, both dates inclusive the Lumber Manufacturers' Agency of Centralia, Wash., contractors, furnished and delivered fir timber f. o. b. cars at the Washington mills, in accordance with the terms of their contract with the U. S. Engineer office of this district dated June 3, 1914, for the improvement of Calumet Harbor, Ill., as follows: 252,024 feet b. m. timber, at $8.45 per M, $2,129.60.

This being the last estimate under the contract, no further percentages are retained.

The delivery of the timber on the cars has been actually performed, inspected, and accepted.

This is the second and last estimate submitted under the contract. No part of the above has been included in any estimate heretofore submitted, and, in my opinion, the contractors are entitled to payment under the terms of their contract for the amount specified above.

Respectfully submitted to Lieut. Col. W. V. Judson, Corps of Engineers, U. S. Army. G. A. M. Lijenerantz, Assistant Engineer, GAML–B.

War Department,
United States Engineer Office,
508 Federal Building,
Chicago, Ill., October 19, 1914

I hereby certify that between June 22 and October 10, 1914, both dates inclusive, the Lumber Manufacturer's Agency of Centralia, Wash., contractors, furnished and delivered fir timber f. o. b. cars at their Washington mills, in accordance with the terms of their contract with the U. S. Engineer officer of this district dated June 3, 1914, for the improvement of Calumet Harbor, Ill., and Michigan City Harbor, Ind., in quantities as follows:

672,424 ft. b. m. (Cal. Harbor, Ill.), at $8.45 per M...	$5,681.98
246,576 ft. b. m. (M. C. Harbor, Ind.), at $8.45 per M..	2,083.57
	7,765.55
Previously paid (in two payments).....	7,201.95
Balance now due.....	563.60

The delivery of the timber on the cars at the mills has been actually performed, inspected, and accepted.

This is the final estimate submitted under the contract and contains the aggregate of timber accounted for in the two estimates previously submitted. As all the timber contracted for has been delivered in accordance with the terms of the contract, it is respectfully recommended that payment of the balance due the contractors be made and the contract closed.

Respectfully submitted to Lieut. Col, W. V. Judson, Corps of Engineers, U. S. Army. G. A. M. Liljenerantz, Assistant Engineer. GAML-B.

War Department,
United States Engineer Office,
508 Federal Building,
Chicago, Ill., February 1, 1915.

Address reply to the district engineer officer, Chicago, Ill. Refer to file No. Chi. H. 259:

I hereby certify that between Dec. 24, 1914, and January 23, 1915, both days inclusive, the Union Lumber Co., of Union Mills, Wash., contractors, furnished and delivered fir timber f. o. b. cars at their Washington mills, in accordance with the terms of their contract with the U. S. engineer officer of the Seattle, Wash., district, dated August 5, 1914, for the improvement of the harbor at Chicago, Ill., as follows:

20,628 feet b. m., 12″ x 18″ timber, at $10.25	$211.44
479,187 feet b. m. 12″ x 18″ timber, $8.25	3,953.29
Amount now due	4,164.73

This being the last estimate submitted under the contract, no percentage is retained.

The delivery of the timber on the cars at the mills has been actually performed, inspected, and accepted.

This is the fifth and last estimate submitted under the contract. No part of the above has been included in any estimate heretofore submitted, and in my opinion the contractors are entitled to payment under the terms of their contract for the amount specified above.

Respectfully submitted to Lieut. Col. W. V. Judson, Corps of Engineers, U. S. Army. G. A. M. Liljencrantz, Assistant Engineer. GAML/B.

Refer to File No. —.

War Department,
United States Engineer Office,
508 Federal Building,
Chicago, Ill., February 1, 1915.

I hereby certify that between the 17th of August, 1914, and 23d of January, 1915, both dates inclusive, the Union Lumber Co., of Union Mills, Wash., contractors, furnished and delivered fir timber f. o. b. cars at their Washington mills, in accordance with the terms of their contract with the U. S. Engineer officer of the Seattle, Wash., [fol. 25] district, dated August 5, 1914, for the improvement of the harbor at Chicago, Ill., as follows:

57,600 feet b. m. timber (12″ x 18″) @ $10.25	$590.40
2,779,660 feet b. m. timber (mixed) @ $8.25	22,932.19
	23,522.59
Previously paid (in five payments)	22,486.61
Balance now due	1,035.98

The delivery of the timber on the cars has been actually performed, inspected, and accepted.

This is the final estimate submitted under the contract; and, in my opinion, the contractors are entitled to payment, under the terms of their contract, for the amount specified above.

Respectfully submitted to Lieut. Col. W. V. Judson, Corps of Engineers, U. S. Army. G. A. M. Liljencrantz, Assistant Engineer. GAML/B.

Appendix C to Findings

(Telegram)

Vicksburg, Miss., Aug. 28, 1916.

Carolina Portland Cement Co.,
Erato and Clara Streets, New Orleans, La.:

Your proposal accepted. Ship at once two thousand barrels Pittsburgh Laboratory tested cement. Government bills lading mailed testing laboratory, Birmingham, to-day.

Slattery.

Official. Govt. rate paid. Charge 3d Miss. River Dist., Vicksburg, Miss.

Advertisement

Proposals for Cement.—Office of Third Mississippi River District, P. O. Box 404, Vicksburg, Miss., Aug. 15, 1916.—Sealed proposals for furnishing and delivering American Portland cement for use in bank revetment work will be received at this office until noon, Aug. 28, 1916, and then publicly opened. Information on application.

J. R. Slattery, Major, Corps of Engineers.

Specifications

1. It is understood and agreed that the accepted bidder assumes full responsibility for the condition of his material until it is delivered to and accepted by the United States. Material will be considered as delivered to the United States when it is received by the United States either in cars, or barge, or in warehouse.

[fol. 26] 2. Specifications and tests for the cement shall be for an American Portland cement as prescribed in circular No. 33 of the United States Bureau of Standards, a copy of which may be seen at this office. Copies probably may be seen at any U. S. engineer office. Tests will be conducted at the mill either by a recognized testing laboratory or by the United States. Tests may be repeated by taking samples from cement when it is delivered in cars, or barge, or

in warehouse. All expense of testing will be borne by the United States.

3. The cement shall be delivered in sacks. Bidders will state a unit price per barrel, including four sacks; and will further state the deduction that will be allowed, in the final settlement, for each sack returned to the accepted bidder in serviceable condition, f. o. b. cars at the point of delivery of the cement.

4. Rejected Cement.—No rejected cement will be paid for. Should any cement be rejected at the site of the work, the cost to the United States for all handling, towing, and storing of same will be deducted from any money due or which may become due the accepted bidder. Such condemned cement must be promptly removed by the accepted bidder. Failure to do so will constitute authority for the district engineer to cause same to be removed and stored at the accepted bidder's risk and expense.

5. Quantities.—Proposals will be received for 10,000 barrels, subject to an increase or decrease of 20 per cent.

6. Delivery, Place of.—Proposals will be considered for delivery f. o. b. cars at point of manufacture, and f. o. b. cars on U. S. 3d district warehouse switch on the Y. & M. V. R. R. at Vicksburg, Miss.

7. Delivery, Time of.—Delivery shall begin within 30 days after date of receipt of notification of acceptance of proposal, and shall be completed by December 15, 1916. Delivery during this period shall be at such rates as the district engineer may direct. It is expected that delivery of about 2,000 barrels will be required at once, and that the remainder of the cement will be required at the rate of about 2,000 barrels per month, starting Sept. 15, 1916. Should the United States be unable to receive and care for the cement at this rate, or to receive all the cement before December 15, 1916, notice will be given to suspend deliveries or to deliver at a lesser rate, and the time of completion will be correspondingly extended; but no claim against the United States shall be made by the accepted bidder on account of such suspension or decrease in rate of delivery. All orders will be for carload lots. Delivery under any order shall be made within 15 days after receipt of order.

8. Payments.—Payments will be made monthly for all cement received and accepted.

9. Proposals should be sealed, marked "Proposals for Cement," and addressed to the District Engineer Officer, Third Mississippi River District, P. O. Box 404, Vicksburg, Miss.

10. On all questions arising under these specifications the decision of the purchasing district engineer officer shall be final. If the bidder to whom award is made shall fail to comply with any of the terms and requirements of these specifications, which shall form a part of his proposal, it will be sufficient cause for canceling the order

given him without notice. Should the accepted bidder for any reason delay or fail to make delivery of the material ordered from [fol. 27] him within the time and at the place required by the order, or if the order given him has been canceled for failure to comly with the specifications, the purchasing district engineer officer shall have the right to purchase in the open market such material as may be required to make good the deficiency and to deduct the excess cost, if any, of such material over and above what it would have cost at the accepted bidder's price from any money due or to become due the accepted bidder.

11. The United States reserves the right to reject any or all bids and to waive any informalities in the bids received.

Proposal

New Orleans, August 26, 1916.

The District Engineer Officer,
Third Mississippi River District,
P. O. Box 404, Vicksburg, Miss.

SIR: In accordance with the above advertisement and specifications we (or I) propose to furnish and deliver in sacks "Standard" brand American Portland cement at the following unit prices: Place and manner of delivery, f. o. b. cars point of manufacture, Leeds, Ala. Price per barrel, 10,000 barrels, $1.44½. F. o. b. cars Vicksburg, Miss. (on third district warehouse switch), per barrel, $1.90. A deduction of 10 cents will be allowed for each empty sack returned f. o. b. cars at the point of delivery of the cement under paragraph 3 of the specifications.

Carolina Portland Cement Co., By H. Ball Bowers, Manager,
Corner Clara and Erato Streets, New Orleans, La.

Telephoned that 5 cents barrel off for cash in 10 days.

A. M. T.

War Department,
Mississippi River Commission, Third District,
Post Office Building, P. O. Box 404,
Vicksburg, Miss., August 28th, 1916.

To Carolina Portland Cement Co., at New Orleans, La.:

Please deliver the following articles to Geo. W. Cummins, inspector and overseer, f. o. b. cars, Leeds, Alabama, and charge to the account of district engineer officer, Third Mississippi River District, Vicksburg, Miss.

Send bills in duplicate to this office, placing on original the following certificate, viz: "Certified correct and just; payment not received." Where a bill is certified in the name of a company or corporation, the signature of the person writing the company or corporate name, as well as the capacity in which he signs, must appear.

About 10,000 Bbls. Portland cement, in sacks, $1.44½ Bbl., f. o. b. Leeds, Ala.

All as per specifications, copy attached.

5¢ Bbl. to be deducted if invoice paid within 10 days from date of same.

[fol. 28] Tests are to be made by Pittsburg Testing Laboratory, Birmingham, Ala.

J. R. Slattery, Major, Corps of Engineers, U. S. A., By Harry C. ——.

Invoice No. 12358

Voucher No. 12. September, 1916

War Department, Third Mississippi River District

[Public Voucher, Purchases and Services Other Than Personal]

Appropriation: Mississippi River (Cottonwood, Miss.)

The United States to Carolina Portland Cement Co., Dr.

Corner Clara & Erato Sts., New Orleans, La., 1920

Date of delivery or service, 1916	Article or service	Quantity	Unit price	Amount
Sept. 5.	Cement, as per bill attached.	1,940 barrels	$1.44½	$2,803.30
	Less charge for 7,760 sacks, @ 10c. each (to be paid subsequently, if sacks are not returned to Leeds, Ala.) $776.00			
	Less 5c. per bbl. for payment within 10 days 97.00			
				873.00
	Total			1,930.30

Examined by C. M. K.

I certify that the above articles have been received by me in good condition, and in the quality and quantity above specified or the services performed as stated, and they are in accordance with orders therefor; that the prices charged are reasonable, and in accordance with the agreement, or that they were secured in accordance with No. 2 of the method of advertising and under the form of agreement lettered B as shown on the reverse hereof.

J. R. Slattery, Major, Corps of Engineers.

Paid by check No. 12840. September 8, 1916, of Major J. R. Slattery on Treasurer of the United States, in favor of payee named above, for $1,930.30.

Form No. 330. Public Voucher No. 12. September, 1916. Third Mississippi River District. Amount, $1,930.30, in favor of Carolina Portland Cement Co., accounts of J. R. Slattery, major, Corps of Engineers, Vicksburg, Miss. First.

[fol. 29] APPENDIX D TO FINDINGS

War Department,
Office Mississippi River Commission,
First and Second Districts,
Customhouse, Memphis, Tenn., September 13, 1915.

Bucyrus Company,
South Milwaukee, Wisconsin.

Gentlemen:

Referring to proposal of your chief engineer by letter of September 8th in conjunction with your telegram of September 11th, I have to inform you of the acceptance of your proposition for furnishing and installing concrete mat revetment plant for the total sum of $10,285.00; delivery to be made at South Milwaukee within ten (10) weeks, and erection to be commenced and pushed to earliest completion immediately upon arrival of material at Memphis, all subject to the approval of your details and working drawings, which please forward as fast as the same are prepared.

The total price stated is the sum of $9,775.00 for material, $1,175.00 for erection and services of operator, with deduction of $665.00, covering the omission of spuds ($500.00) and spud casings ($165.00), in accordance with your telegram of the 11th instant.

In other words, the proposition contemplates your provision and erection of all the elements indicated in your proposal of the 9th and its accompanying drawings, except spuds and spud casings. As to the latter we have on hand five fifteen-inch sixty-pound spuds and five casings, blue print of the details of which accompanies. These spuds are forty feet in length, and in the interest of present economy will be sufficient for the experimental purposes proposed. Other spuds and casings can be procured for future field work should the experimental operations in contemplation be successful.

If, in your judgment, for any reason these spuds and casings are not deemed suitable, please communicate in regard thereto.

It will be appreciated if you will push this matter to the utmost in the endeavor to gain any possible time.

Regarding the construction to be provided by the United States, I would appreciate such details as are required at your earliest convenience, so that we may be prepared for your installation without delay. Especially in regard to fingers or ways of the mat barge, we would desire details promptly, the said barges being already complete, except for their platforms and ways. Similarly regarding any

strengthening or readjustment required on the mooring barge for the reception of your anchorages and machines.

Regarding the main engine proposed, it is requested that it be provided with suitable connection, such that, by way of an idler, additional shaft may be introduced to the left and parallel to the present installation, on which additional drums may be later introduced for the raising of additional trusses in case a future extension of mat length be determined upon.

Payment for the material and installation in question will be made immediately upon satisfactory installation and at the conclusion of the services of the operator to be provided.

[fol. 30] Regarding shipment, this office will arrange through the Milwaukee engineer office to ship on Government bill of lading immediately upon your request.

Very respectfully, E. M. Markham, Major, Corps of Engineers.

I neglected to say above that the deck of the mooring barge will be extended three feet on each end, as you suggest, thereby giving a total available length of 126 feet.

E. M. M. 1 inc.

A true copy: J. R. ——, Chief Clerk.

Bucyrus Company

General Office

South Milwaukee, Wis.

South Milwaukee, Wis., 9/8/15.

Subject: Concrete mat revetment plant.

Major E. M. Markham,
Corps of Engineers,
The Mississippi River Commission, 1st and 2nd Dist.,
Memphis, Tenn.

Dear Sir:

This is in reply to your letter of August 7th requesting us to submit on or before September 10th complete data concerning plant which we offer for above purpose, together with estimated weights and prices at which we can furnish the material.

As we have been very much pressed for time, and as I understand that the proposals are informal, I take the liberty of combining the various items of information which you request under subheadings in the following proposal letter.

General Description.—The proposed arrangement is shown on our drawing No. 43917, and comprises seven trusses, with the necessary raising tackle, winch for operating same, engine, boiler, triggers, and tripping gear for releasing the mat, sheaves and fair leads, wire ropes, spuds guides, and power blocks for hoisting spuds. The layout calls for a mat barge and mooring barge, each 126′ long, al-

though you describe your mooring barge as being 120′ long. We suggest that the deck of this barge be extended 3′ on each end, which extension can readily be supported on brackets and thereby enable the plant to handle a longer mat.

End Trusses.—Two end trusses are provided, each comprising a single girder in vertical plane and serving to manipulate the mat barge. A closed circuit of wire rope is provided from one of the winch drums around each of the end trusses and to an anchorage on the inboard side of the mat barge. This enables operator to move the mat barge to and from the mooring barge always under control.

Intermediate Trusses.—Five intermediate trusses are provided, each properly proportioned to sustain a load of 40,000#, the five trusses being used to sustain a mat weighing 100 tons under water. Each of the intermediate trusses comprises a vertical main girder and two outboard chords and supports fifteen triggers for holding [fol. 31] the concrete mat until its release. This provides a total of seventy-five triggers over the entire mat.

Triggers, Supporting & Releasing Gear.—The mat is supported on a system comprising five drums, located on a single shaft and operated by a hand winch, each drum having two lines reeved upon it. A shaft is supported on the middle truss and parallel to the main girder, the lines extending from their respective drums across all of the apex points on the various intermediate trusses and being anchored off on the outer chords of the intermediate trusses adjacent to the two ends of the barge. At each apex point the line is formed into a bight, carrying a small pulley which supports the trigger. Before launching the mat each trigger is hooked into a properly located loop brought out from the mat reinforcement, and all the lines are pulled up taut by the hand winch and drums. A set of trigger release lines is provided, which are attached to the bolts in the respective triggers and are anchored in the trusses near the apex points.

When the mat is launched it is suspended in the water on the set of guy lines supported by the respective drums, all trigger release lines being slack. To drop the mat it is only necessary to release the brake on the hand winch gear, which pays out all of the guy lines and trips the triggers stimultaneously. Each truss is equipped with a mat holding line on its outer end to prevent the mat from moving too far toward the mooring barge. A slip line pin is also provided on each truss to release this holding gear.

Main Winch.—The main winch comprises one 8½″ x 8″ double cylinder steam reversing engine driving eight drums by suitable gearing. One of these drums operates the moving lines, which pass over the end trusses to the mat barge. The other seven drums raise and lower the seven trusses. The bearings of this winch machinery are mounted on steel sole plates, which in turn will be bolted down on wooden foundations, the material for these foundations to be provided by purchaser.

Barge moving drum 24″ in diameter for 1⅛″ plow steel rope.
Truss lifting drums 12″ in diameter for ½″ rope.
4-part tackle to each truss.

Masts & Spud Guides on Mooring Barge.—The mooring barge is provided with seven masts, one being opposite to each of the seven trusses. The masts are of wood, provided and framed by purchaser. Each mast is supported by a back guy and has tackle sheaves fitted into upper end for raising of trusses. A structural steel stringer also extends the entire length of the barge near the tops of the masts.

The five intermediate masts are doubled with space between the pairs of wooden masts forming five spud guides as indicated. Five spuds are furnished, each being 60′ long, and made of 12″ 31½# I-beams. Each spud passes through a pair of steel guides bolted to the double masts above described. Each spud carries a trolley located on the flange below the lower guide, and the trolleys are connected by short lines and clevises to the inboard sides of the mats, retaining their hold on the mat as it sinks to the bottom. Each clevis is provided with a trip line, and each trolley is provided with a hand lifting line.

Trigger Details.—Detailed construction of triggers is shown on drawing 43917. This design provides a construction requiring no [fol. 32] additional links to be set in the reinforcement loops, thus saving 75 welded links. It is also very simple and direct in its application, easily tripped, and will lie down flat in any direction without becoming tangled with the ropes. The design is illustrated by wooden model which we are sending you under separate cover under registered mail.

Weights.—The list of segregated weights which you require is as follows:

7 trussess with sheaves and guy-line machinery complete	53,800#
Main winch machinery	10,500
Winch engine	2,900
Truss suspension gear	1,400
5 spuds 60′ long	9,500
10 trolleys	500
75 triggers	1,900
Boiler, piping, and fittings	6,000
Spud hoist blocks	900
Wire ropes and shackles	3,000
Total	98,600#

Above are estimated weights and are likely to be somewhat overrun in the finished design.

Prices & Deliveries.—Our price for the above-described material complete, f. o. b. So. Milwaukee, is nine thousand five hundred dollars ($9,500.00), and delivery at So. Milwaukee can be made in fourteen weeks (14) from date or order. This price is based on the present mill deliveries for structural steel. We can also get this strutural steel from stock at an extra cost to us of about $275.00. For $275.00 additional, or a total price of nine thousand seven hundred and seventy-five dollars ($9,775.00), we can make the above delivery at So. Milwaukee in ten weeks (10).

Our price for erection of this material and reeving of ropes complete on the barge, including service of operator for two weeks after completion, is eleven hundred and seventy-five dollars ($1,175.00). This is predicated on the deck and all woodwork of the scows being complete and ready for the installation of our machinery without alteration or delay, and also upon the connections between the separate units of the various trusses being made with bolts. The vertical girder of each intermediate truss will be riveted up and the outside chords and connecting angles will be bolted on with black bolts and lock washers.

In the preceding I explained that we are counting on extending the deck of one of your scows to increase its length from 120′ to 126′. If you do not consider this desirable, it will not be necessary to change the dimensions between centers of intermediate trusses so as to shorten the entire length 6′. This will make the intermediate trusses 23′ 6″, center to center, in place of 25′, center to center.

Hoping that this proposal will meet with your favorable consideration, I am,

Very truly yours, Walter Ferris, Chief Engineer.

A true copy: J. R. Sorothes, Chief Clerk. WF:DE. Encs.

[fol. 33] [Application]

War Department, Mississippi River Commission, First and Second Districts

Public Voucher—Purchases and Services Other Than Personal

Appropriation: Maintenance and improvement of existing river and harbor works (for improving Mississippi River, first and second districts). Experimental revetment.

The United States to Bucyrus Co., Dr.

Address: South Milwaukee, Wis.

Object symbol	Date of delivery or service	Article or service	Quantity	Unit	Unit price	Amount	United States notations
	1915 Dec. 31.[1]	Revetment machine, etc.; bills attached.	.....	.....	.....	$9,898.81	
	1916 Feb. 28.	.....	.....	.....	.....	2.82	
		Total	.....	.....	.....	9,901.63	

[1] Payment of bill withheld pending completion of tests, etc. Covered by subproject dated May 6, 1915, par. 3, subheading Experimental Revetment (E. D. 8149/427).

I certify that the above articles have been received by me in good condition and in the quality and quantity above specified, or the services performed as stated, and they are in accordance with orders

therefor; that the prices charged are reasonable and in accordance with the agreement, or that they were secured in accordance with No. 6 of the method of advertising and under the form of agreement lettered C, as shown on the reverse hereof.

All articles marked "P" on attached bills will be accounted for in my next return of engineer property.

E. M. Markham, Major, Corps of Engineers.

Paid by check No. 16157, dated March 25, 1916, of E. M. Markham, major, Corps of Engineers, on Treasurer of the United States, in favor of payee named above, for $9,901.63.

A true copy.

J. R. Prentiss, Chief Clerk.

[fol. 34] IN THE COURT OF CLAIMS

VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the First day of May, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff herein is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid the sum of One hundred and seventy-five dollars and thirty-one cents ($175.31), the cost of printing the record in this court, to be collected by Clerk, as provided by law.

By the Court.

IN THE COURT OF CLAIMS

VII. PROCEEDINGS AFTER THE ENTRY OF JUDGMENT

On June 5, 1922, the plaintiff filed a motion to set aside the judgment of May 1, 1922.

On June 12, 1922, the court overruled said motion.

On June 23, 1922, the plaintiff filed a motion for leave to file a motion to amend findings.

On June 26, 1922, the motion for leave to file motion to amend findings was allowed.

On June 27, 1922, the plaintiff filed a motion for amended findings of fact.

On December 4, 1922, the court overruled said motion.

[fol. 35] IN THE COURT OF CLAIMS

VIII. PLAINTIFF'S APPLICATION FOR APPEAL

Claimant shows to the court that this case involves more than thirty thousand dollars ($30,000.00); that on May 1, 1922, the court filed findings of fact and rendered a judgment dismissing the petition; that on June 5, 1922, claimant filed a motion to amend said findings of fact and set aside said judgment, and on December 4, 1922, the court made an order over-ruling said motion. Claimant hereby prays an appeal to the United States Supreme Court from said judgment and order.

Benj. Carter, Attorney for Claimant.

Filed January 29, 1923.

IN THE COURT OF CLAIMS

IX. ORDER OF COURT ALLOWING APPEAL

On consideration of the plaintiff's application for appeal in this cause it is ordered by the court that an appeal be and the same is allowed from the final judgment of the court in this cause.

Entered February 5, 1923.

[fol. 36] COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, memorandum filed by the court and appendices A, B, C, D, thereto; of the judgment of the court; of the plaintiff's application for appeal and of the order of the court allowing same.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of February, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,461. Court of Claims. Term No. 248. The Illinois Central Railroad Company, appellant, vs. The United States. Filed March 19th, 1923. File No. 29,461.

IN THE

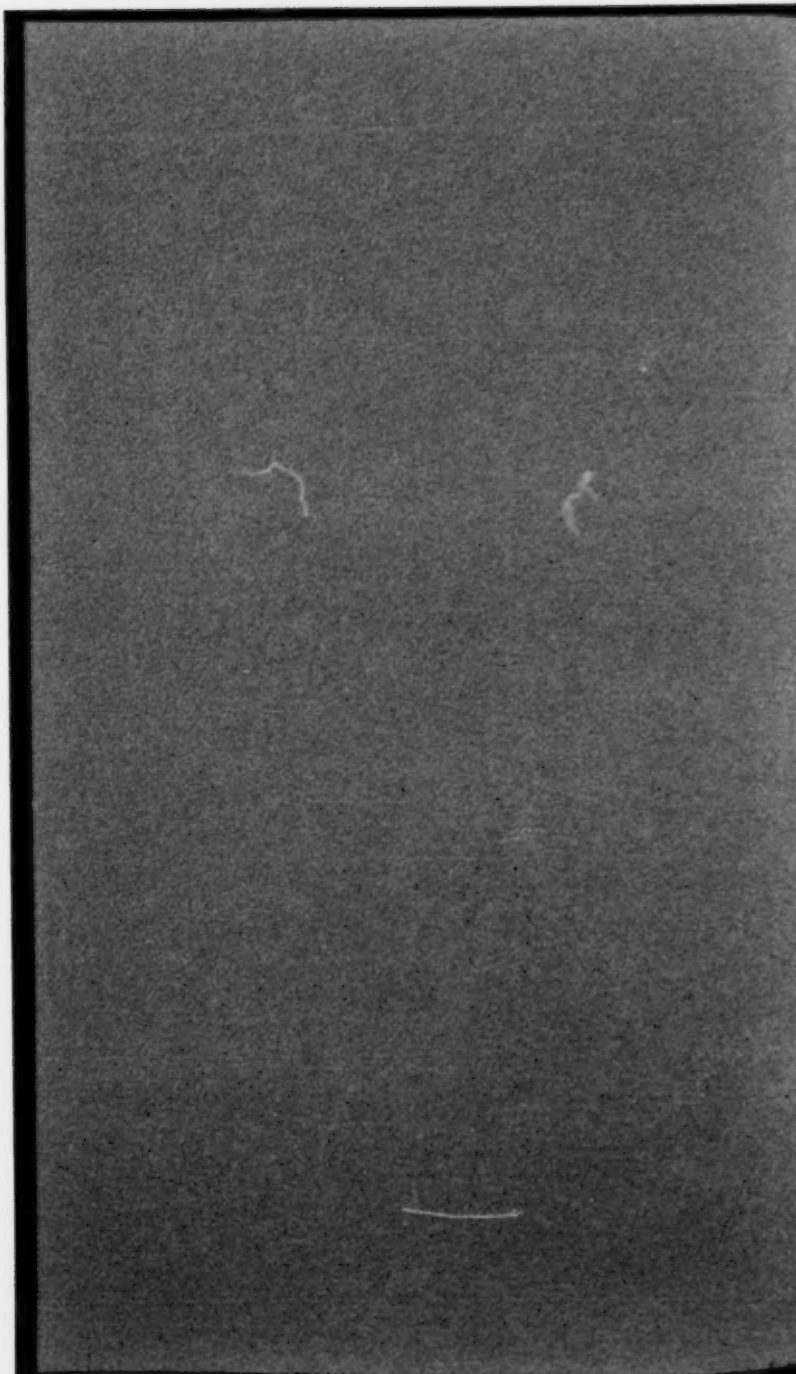
Supreme Court of the United States.

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
THE UNITED STATES.
No. 248.

BRIEF FOR APPELLANT.

BENJAMIN CARTER,
Attorney for Claimant.



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CASES CITED.

IN THE

Supreme Court of the United States

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, vs. THE UNITED STATES. } No. 248.

BRIEF FOR APPELLANT.

The question which this case presents is whether freights intended for Government uses, but which the Government was under no obligation to accept until after they had reached destination, were, while in transit, "property of the United States" and lawful subjects of transportation rates at which, in virtue of land grants, "property of the United States" should be transported. This, and two other cases of other carriers which are before this court arose out of the contumacy of disbursing officers in claiming for the Government a privilege which had been denied to it by repeated decisions of the Comptroller of the Treasury. That officer had first ruled in favor of the carriers in cases where commercial bills of lading had been used. The first device, then, of officers making shipments, was to require the use of Government bills of lading; but the Comptroller held that the rights of the parties were not affected by this detail. Some over-zealous officers then had recourse to a form of purchase from producers

of the materials by which purchase prices applied at the points of shipment. The shipments were on Government bills of lading; but specific stipulations were (1) that, although the Government would pay, or advance, the freight charges, the shipper would be responsible for the shipment, including demurrage charges which might be incurred, and (2) that examination, in one form or another, would be made by the Government's officers after delivery at, or beyond, points of destination, that nothing would be accepted which did not successfully pass this test and that shippers would remove rejected materials and repay the transportation charges on those quantities.

Assuming, from the fact that Government bills of lading were used and the fact, in some instances, that the shipper, as well as the consignee, was a Government officer, appellant, upon delivering the freights, rendered and collected its bills at land-grant rates. Thereafter, it received intimations regarding the terms of the contract under which the shipments were made and, upon investigation, ascertained the facts here stated.

Assignment of Errors.

Appellant says that the Court of Claims erred:

1. In holding that materials which the Government had the option to accept or reject at points of delivery were the property of the Government while in transit.

2. In holding that land-grant rates were applicable to the transportation of materials which the Government did not accept until after delivery at destination.

3. In dismissing the petition.

Propositions.

1. Land-grant rates are not lawfully applicable to any transportation, even though procured by Govern-

ment officers of the United States, except of property of the United States.

2. That supplies ordered by and shipped to authorized officers of the United States, who were to test or inspect them, at or beyond destinations, and thus determine whether to reject or accept them, did not, while in course of transportation, belong to the United States.

3. That the fixing of purchase prices to apply at points of shipment does not effect a transmission of title to commodities from the producers to the United States if the acceptance of the supplies by the United States depended, by contract, upon questions to be determined by its officers at or beyond destinations of the shipments.

4. That the mere payment of freight charges by a consignee does not divest title to the freights out of the shipper and vest it in the consignee.

Argument.

While the subject matter of this suit is correctly presented in the foregoing statement of facts, the controversy really concerns only a part of the shipments narrated in the findings of the Court of Claims. In most of these transactions nothing occurred to vest title to the freights in the United States until after delivery at or beyond destinations, but in others, viz., those to which finding VII relate, (lumber from mills in the state of Washington shipped to Chicago) there was to be, and was, a definitive examination of the material at the mills from which it came, and acceptance or rejection occurred at those points; the United States engineer for that district, at the request of the engineer for the Chicago district, having assumed that function and stationed his inspectors at the mills. Appellant con-

cedes that it has no right of action on these exceptional transactions; but it asserts its right, regarding the others, to be paid the difference between land-grant rates, which were paid, and the full tariff rates.

With respect to numerous shipments of coal, terminating at Missouri River points, appellant will ask this court to assert its power in order to establish the fact that, under the provisions of the contract, appellant delivered coal into its own barges and it was kept there until, in the progress of the work, it was needed, the Government paying no demurrage, rental or other like charge. A motion will be made for this emendation of the findings, if this court should deem it necessary.

It is elementary that, in executory contracts of sale between private parties, stipulated preliminaries, e. g., acceptance or examination, or selection of some part out of a mass, must be performed before title passes out of the seller; and nothing is clearer in the adjudications of this and other courts than that, in matters of contract, the Government's rights and obligations are precisely those of private sellers and buyers. This canon of the transmission of title, the layman might say, has been carried to a great length by the courts. A familiar illustration since 1882 has been *Clarkson* v *Stephens*, 106 U. S. 505, where, as it happened, the Government was a party. The appellant in that case undertook to build, and in large part did build, a war steamer for the United States. The Secretary of the Navy, under express provisions of the contract, appointed agents who received materials in the shipyard, gave receipts for them as property of the United States and marked them "U. S." Payment was to be in installments, on approval by inspectors as to qualities but not values, for materials purchased and used; but before final payment the completed vessel was to be surveyed

by a board provided for in the agreement and a certificate given that the contract was fully performed. Stephens died without completing the ship and his estate was declared bankrupt. By his will he directed his executors to complete it at cost of a million dollars and then give it as a present to the State of New Jersey. This direction substantially was carried out. Suit was brought by the executors against the Attorney General of the State for construction of the will. This court held that title actually did not pass from Stephens to the United States, and could not have passed, if the vessel had been completed, because the stipulated survey and certification had not been made.

Following are typical cases of State courts:

Gorman v. *Kennedy*, 126 Mich., 182, like the present case, arose out of a public improvement, and the decision was that the material in question did not become public property until, at the place of use, tested by specifications of the public authorities. The plaintiff, a quarryman, had quarried curb-stones for use on streets of the city of Detroit and had given what was held to be a guaranty that the quality should be up to specifications of the city Board of Public Works. Delivery was to be made by the quarryman at Detroit. The court said: "'On cars at Detroit,' or 'f. o. b. cars at Detroit' did not mean the place agreed upon for inspection and acceptance, but only defined the place where the expense of transportation of plaintiff ceased and that of defendants began."

Even in the detail of payment of transportation charges to points of destination that case and the case here presented are identical.

Smart v. *Batchelder*, 57 N. H., 140, dealt with a contract for the sale, out of a stock of boards at a saw mill, of so much as should prove to be merchantable; delivery of the whole stock to be made by the miller at a place named, where there was to be a survey as to quality. Failing such a survey, it was held, there was no sale.

In *Cornell* v. *Clark*, 104 N. Y., 451, ties delivered to a railroad company under contract were to be inspected and classed. No inspection having been made, the company had avanced moneys to the contractor. Upon the insolvency of the latter it was held that the title was still in him—there had been no sale of any tie.

To the same effect—treating advances as having no effect on the title when inspection and acceptance were omitted—are

Smith v. *Wisconsin Investment Co.*, 144 Wis., 151.

Wagar v. *Farren*, 71 Mich., 370.

So it is immaterial in the present case that the Government's officer, upon visual inspection and acceptance of coals at destination, was authorized to pay a percentage of the base price named in the contract.

In a like case (of advances without inspection) logs had been delivered, by the contractor at a place stipulated and thereafter he had sold and delivered them to a third party. On proceedings against him for a conversion the court *assumed* that examination and acceptance were intended in the first transaction and so decided that the title to the logs, unexamined, remained in him and the second transaction was lawful.

Pike v. *Baughn* et al., 39 Wis., 499.

In *Blodgett* v. *Hovey*, 90 Mich., 571, and in *Wagar* v. *Farren*, *sup.*, inspection was prevented by accidental destruction of the property, and it was held that the

loss was the sellers'—that the title had not passed. If in such a case as is here presented any consignment of materials were destroyed while in transit, and the Government was to stand the loss, what would the loss have been: what kind of bill could the skipper have rendered when no selection had been made, by inspection, of materials which the Government would take and use? In fact the bills were made in this case for those quantities which the Government agents, at the places of use, had approved as of the contract quality.

Not infrequently when nothing remained to be done but to determine the prices, title has been held to have passed by delivery of the goods; but in those cases the goods themselves, the subject of the valuations, were absolutely identified. Here the quantity passing by the sale was to be determined by the inspection, and until this was done it was impossible to fix any value (contract price) for the consignment.

In this case, as regards coal shipments delivery was made by the sellers to themselves, on their own barges, at points of destination, and the supplies were held there, at their risk, until inspected and accepted.

Policies and Forms Must Yield to Legal Rights.

In availing of land-grants the Illinois Central Railroad Company contracted to transport "property of the United States," and no property of any other owner, beside organized troops of the United States, and no other passengers, at special rates. To transport at those special rates property of which the United States might thereafter be the owner, or property which, or some undefined part of which, was expected, after shipment, to be used by the United States, is another

thing. The Government, like any private operator, has its option. It may buy goods at points of production, ship them on its own account and so stand the risk of the loss before delivery at points of destinations and use, or it may leave all such risks to the dealers in such goods and make its purchases from them at the places of use. In the one case the bringing of the goods to the points of use is a Government transaction, and Government rates should apply to the transportation; in the other case it is not a Government transaction, and there is no escape from paying the commercial rates.

An ideal *policy*, from the point of view of the Government's exchequer, would be for the Government to escape all burdens of the transportation but to avail of land-grant rates. This the law does not countenance; but it is precisely what has been done in these cases.

If this practice were lawful, why should not the Government buy from large dealers in the principal markets, to which the materials had been brought by land-aided railroads, and then charge to and collect from the railroad companies the differences between land-aided rates and the rates which had actually been paid to them in this assembling of the stocks? In substance that procedure and the one here at issue are the same.

An accepted land grant is a contract for the carriage of "property of the United States" at reduced rates. It is not a contract for the carriage of something which ultimately may serve the Government's use, being *in presenti* private property. Congress might have made provision for a contract of this latter effect, but it did not see fit so to do.

That the Government, by the practice here con-

cerned, obtains the same benefit that would have followed from taking title at points of shipment on land-aided lines and paying land-grant rates, is immaterial. What this court said in *United States* v. *Union Pacific Railroad Co.*, 249 U. S. 354 (359) is equally pertinent here, viz., "the fact that the transportation is for the purposes of the Government in connection with its military establishment is immaterial." Under this observation the court made reference to the *Alabama Great Southern Railway Company's* case, 49 Ct. Cls. 522, relating to transportation of state militia, at the expense of the United States, to camps of instruction where they were to be commanded by United States officers, all under Federal law; the decision, which forbade the application of land-grant rates in such cases being rested flatly on the definition of the word troops, without regard to the interest of the United States in the passengers transported.

The Court of Claims repeatedly, commencing with two cases of the Louisville & Nashville Railroad Company, 50 Ct. Cls. 414 and 54 Ct Cls. 161, has decided that land-grant rates do not apply to personal property of army officers involved in a change of station of the command. Here, again, the question was whether the chattels were included in the phrase "property of the United States." Since they were not so included, it was immaterial that the Government's interest required their transportation; that the officer was not able to function without his clothing, accoutrements, books, desk, etc., at the new post any more than at the old.

For the transportation of private property, in short, a railroad company, although land-aided, is entitled to be paid full commercial rates, notwithstanding any collateral interest of the Government or simulation of a

transmission of title to the Government at the commencement of the shipment.

Claims not Barred while Transactions were by the Railroad Company.

The only practical effect of the use made of Government bills of lading is to give this court jurisdiction of transactions more than six years old at the time the suit was instituted. This misapplication by Government officers of a Government form was a legal fraud upon the railroad company; and, according to the adjudications in like cases, time did not begin to run against the assertion of the railroad's claim so long as its officers were in ignorance of the real facts. The company pleads that until after its bills on these shipments were paid it had no notice that the freights involved did not belong to the Government; and on the Government's part there is no proof of anything that could have carried such notice.

In *Exploration Co.* v. *United States*, 247 U. S. 435, this court construed an enactment of Congress of March 3, 1891, (26 Stats. L. 1093), authorizing suits by the United States, for vacating land patents, to be brought "within six years after the date of the issuance of such patents." The patent there concerned had been obtained by fraud, which was concealed by the patentee until after the limited six years had passed. The decision was that the time of the bar ran from the Government officers' discovery of the fraud. After reviewing adjudications of similar questions arising between individuals the court said (p. 449):

> "We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud,

should not apply in favor of the Government as well as a private individual."

This observation seems a sufficient recognition of the rule that a statute of limitation does not operate against a private person while he has fradulently been kept in ignorance of his right. The court reviewed or cited divers suits between private parties, and there is no suggestion that the rule must be different where the suit is against the Government, whose agents had kept a citizen quiet by deceiving him.

On the face of the laws the commencement of the limitation period is more distinctly marked in the patent-cancellation statute than in the act governing the jurisdiction of the court. In the former case, it will be observed, this is a day certain, that of the issuance of the patents. Suit is to be brought in the Court of Claims within the next six years "after the claim first accrues." (Judicial Code, sec. 156.) All of the statutes reviewed in *Exploration Co.* v. *United States* were in practically the same words, and none contained any saving against hidden fraud; yet the rule was approved that the statutes "did not begin to run until the discovery of the fraud."

Shall it be said that the act relating to the Court of Claims is jurisdictional and that the patent-cancellation act (granting a remedy where none existed before) is not jurisdictional? But even so, are not the same words to bear in a jurisdictional statute the same meaning that they bear in a statute of procedure or evidence.

This question of limitation arises only on a few transactions listed in paragraph V of claimant's requests for findings.

Respectfully submitted,

BENJAMIN CARTER,
Attorney for Claimant.

CONTENTS

CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1923

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant
v.
THE UNITED STATES
No. 248

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

The Illinois Central Railroad Company, a land-grant railroad, presented to the Government for payment certain accounts for the net freight for the transportation of coal and other articles after making the proper land-grant deductions, and payment was made to it of the full amount and accepted without protest.

Without any charge of fraud, misrepresentation, or deceit, the company subsequently brought suit on substantially the following statement of facts which are taken from the findings of the Court of Claims.

In 1914, Major Hoffman, Corps of Engineers, contracted with Chicago & Carterville Coal Co. to furnish coal for river improvements in the vicinity of Dubuque, and the coal was shipped during that year from Herrin to Dubuque. In the same year he also contracted with the Colleries Sales Company for coal for the same purpose, which was shipped during that year from Eldorado to Dubuque. In 1915 and 1916 he made two contracts, one in each year, with Rutledge & Taylor Coal Company for coal for the same purpose, which was shipped during 1915 and 1916 from Duquoin to Dubuque. (Tr. 4.)

Under the four contracts, the coal was delivered "on board cars at the different mines, and was shipped over plaintiff's lines therefrom to Dubuque on Government bills of lading furnished to said coal companies by the Government, which were duly accomplished, the coal inspected and accepted at that place by the proper Government officials." The total land-grant deductions on the shipments made by the Illinois Central in stating its own bills amounted to $5,234.61. (Tr. 4, 5.)

During 1911, 1912, 1913, and 1915 numerous shipments of materials and supplies, such as coal, stone, lumber, hardware, and other articles for use in Government improvements on the Missouri River were made over the Illinois Central from points in Illinois, South Dakota, Missouri, Mississippi, and Louisiana to Sioux City and other points in Iowa and Omaha. The material and supplies were all purchased on invitation to bidders, proposals of bidders, and

vouchers, on which payments were made to the sellers. The form of invitation on which bids were made invariably read: "The prices will be for the articles delivered f. o. b. cars at ———. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any responsibilities as shipper that would attach if the delivery had been at destination." (Tr. 5.) This form of invitation was only used over land-grant or bond-aided roads and was never used where delivery was to be made at point of use.

The shipments were all made on Government bills of lading, which were accomplished, the articles inspected and accepted at points of use by the proper Government officials. The total land-grant deductions on such shipments made by the Illinois Central in stating its bills amounted to $9,695.27. (Tr. 5.)

The Government official, examined as to the purchase of the above articles, produced the form of invitation quoted—one bid and one voucher, upon which payment was made. Land-grant deductions were made more than six years prior to the filing of the suit on March 23, 1918, amounting to $2,511.68. (Tr. 5.)

On June 3, 1914, Colonel Judson, Corps of Engineers, entered into a contract with Lumber Manufacturers' Agency of Centralia, Wash., for 888,720 feet b. m. fir timber for breakwater repairs in the

Chicago district to be delivered on board cars at the company's mills, and to be inspected, both at the mills and at the point of delivery, before acceptance and payment.

On August 5, 1914, Major Cavenaugh, Corps of Engineers, entered into a contract with Union Lumber Company, Union Mills, Wash., for 2,793,180 feet b. m. for timber to be delivered on board cars at the company's mills, the timber to be used for constructing part of the exterior breakwater at Chicago. Inspections were to be made at the company's mills and final inspection at point of delivery before acceptance and payment. Deliveries were made as required by the two contracts and timber was all inspected at the mills and afterwards at Chicago and was accepted and paid for in accordance with certificates of the Engineer officer in charge of the work. The shipments were made on Government bills of lading and were partly over the lines of the Illinois Central. The total land-grant deductions made by the Illinois Central in stating its bills amounted to $9,340.18. (Tr. 6.)

On August 15, 1916, the Government advertised for sealed proposals to furnish and deliver cement for use on revetment work on the Mississippi River at Vicksburg. The specifications furnished to prospective bidders stated that proposals would be considered for delivery f. o. b. cars at point of manufacture, and f. o. b. cars on the Government warehouse switch at Vicksburg. The Carolina Portland Cement Co. of New Orleans, on August 26, 1906 (1916), proposed to furnish 10,000 barrels at $1.44½

per barrel f. o. b. cars point of manufacture, Leeds, Ala., or f. o. b. cars at Vicksburg, $1.90 per barrel. The proposal was accepted at $1.44½ per barrel f. o. b. cars Leeds. The cement was shipped in 1916 over plaintiff's lines to Vicksburg on Government bills of lading, which were accomplished, and the cement tested and accepted by the proper Government officials. The total land-grant deductions on such shipments made by the Illinois Central in stating its bills amounted to $251.24. (Tr. 6.)

On August 7, 1915, Major Markham, Corps of Engineers, in charge of certain Government work on the Mississippi River, headquarters at Memphis, wrote to the Bucyrus Company of South Milwaukee, Wis., inviting a proposal to furnish and install a concrete mat revetment plant. On September 8, 1915, the company proposed to deliver the plant at South Milwaukee in 14 weeks from date of order for $9,500, or to deliver same at South Milwaukee in 10 weeks from date of order for $9,775, and to put up and install the plant at Memphis and furnish an operator for two weeks for $1,175 additional. On September 13, 1915, the proposal of the company was accepted for delivery at South Milwaukee in 10 weeks, with certain changes of price and construction, which appear to have been accepted. The plant was shipped over the Illinois Central lines to Memphis on two Government bills of lading, which were duly accomplished, the plant erected and, after proper tests, paid for by the Government. The land-grant de-

duction made by the Illinois Central in stating its bills amounted to $81.74. (Tr. 7.)

On June 5, 1914, Richard E. Egglebrecht, St. Louis, entered into a contract with the United States, through Capt. F. G. Stritzinger, Quartermaster Corps, to furnish and deliver by June 30, 1915, free on board cars at Carterville, Ill., 13,500 tons of coal to be paid for after delivery at Omaha, at the rate of $1.56 per long ton. On June 1, 1916, Nebraska Fuel Co. entered into a contract with the Government, through Col. G. S. Bingham, Quartermaster Corps, to deliver free on board cars at Duquoin, Ill., coal in such quantities and at such times as might be required by the receiving officer or agent of the Quartermaster Corps, payment to be made at Omaha at the rate of $1.739 per short ton, which included the cost of unloading and storing in bins. The coals so furnished were shipped from Carterville and Duquoin over plaintiff's lines to Omaha on Government bills of lading, which were duly accomplished and the coal inspected and accepted at that place by the proper Government officials. On said shipments land-grant deductions made by the Illinois Central in stating its bills amounted to $159.29. (Tr. 7.)

The Government form of bills of lading used in the transportation of the articles in question provided on its face for the hauling of the Government property only, and the directions on the back limited their use to Government property. The agreement on the back between the United States and the carrier stipulated that prepayment of charges should in no

case be demanded by the carrier, nor should collection be made from the consignee; that on presentation to the office indicated on the face of the bill of lading properly accomplished, attached to freight voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; that the shipment was to be made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate would be available unless otherwise indicated on the face of the bill of lading. (Tr. 8.)

The Court of Claims dismissed the petition (Tr. 8, 13) with judgment to the Government against the Illinois Central for the cost of printing the record (Tr. 33). This appeal was then taken.

ARGUMENT

I

WHEN THE ILLINOIS CENTRAL PREPARED, RENDERED, AND RECEIVED PAYMENT FOR ITS OWN ACCOUNTS WITH THE LAND-GRANT DEDUCTIONS, THE TRANSACTIONS WERE CLOSED BY ITS OWN ACTS AND MAY NOT BE REOPENED BY THE PETITION FILED IN THIS CASE.

The basis of the petition on which the Illinois Central seeks to recover the amount of the land-grant deductions is the single, narrow fact that all of the coal and other articles were shipped f. o. b. the mines with the right of inspection by the Government at the point of delivery or at the points both of origin and delivery. The claim appears to

be that such a condition in the terms of purchase and sale convert the shipments from Government shipments to shipments of the consignors who are not entitled to land-grant deductions and suit is then brought *against the Government* (not against the consignors) for the full amount of the tariff charges.

It does not appear, nor is it material, when the coal and other articles were received and transported and when the bills were rendered and payment received, whether the Illinois Central was or was not informed of the conditions of the contracts or orders with respect to inspection and acceptance at the point of destination, or when, if thereafter, it was so informed. (Tr. 8.)

However, if it was not all within the knowledge of the Illinois Central, its officers and agents, at the time, upon their acquiring knowledge they never made any charge of fraud, misrepresentation, or deceit. That they were Government shipments for which the Government was liable for transportation is an undisputed fact as between the Government and the contractor, and the Illinois Central alleges nothing to the contrary. It merely claims that because the Government reserved the right of inspection at destination, the shipments, *ipso facto*, were shipments for private parties instead of the Government. Years later (some of the items were held barred by the statute of limitations) the Illinois Central not only repudiates its own position but that of the Government and its contractors.

In dismissing the petition the Court of Claims said (Tr. 9):

> The United States and the contractors were privileged to write into their contract such terms as they saw fit, and a third party, even though incidentally interested as a carrier, may not give an effect to one provision other than that plainly intended by the parties because the parties themselves saw fit to agree to other terms regarded by it as inconsistent therewith. Provisions for a final inspection at point of delivery or for the rendering of a further service by the contractor at that point were not inconsistent with and could not be invoked to nullify a specific provision under which the title to the property passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable.
>
> In rendering its bills the plaintiff itself made land-grant deductions from commercial rates, claimed only the land-grant rate resultant from such deductions, and accepted payment thereof without protest. It is thus estopped to assert a further claim for the same service except upon a showing of fraud or mistake of fact. There is no proof that the plaintiff was in any way deceived or mistaken as to the facts or was not fully informed with reference thereto when it rendered the service, presented its bills, and received payment thereof. *B. & O. case*, 52 C. Cls. 468; *Oregon-Wash. case*, 54 C. Cls. 131, affirmed 255 U. S. 339.

In *Oregon-Washington Railroad Co.* v. *United States*, 255 U. S. 339, 343, in affirming the judgment of the Court of Claims which denied the right of the railroad company to recover on the basis of the full commercial rates (from which it had itself made the land-grant deductions) this court, speaking through Mr. Justice McKenna, said:

> There were findings of fact which show that the accounts were presented for payment to the proper accounting officers of the Government in the regular way and payments were made by the disbursing officers of the Government on vouchers certified to be correct and presented by appellant. The charges so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "Land-grant equalization agreements," by which, to quote from the findings, "the carriers agreed, subject to certain exceptions—not material here to be noted—to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement." That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account

> of land-grant distance as provided in the railroad land-grant acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the Government.

In *New York, New Haven & Hartford* v. *United States*, 251 U. S. 123, 127, this court, in affirming the judgment of the Court of Claims which denied the right of the company to recover additional compensation for carrying the mails, speaking through Mr. Justice McReynolds, said:

> And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum.

In *New York, New Haven & Hartford* v. *United States*, 258 U. S. 32, 33, citing the last foregoing case, this court, in affirming the judgment of the Court of Claims which dismissed the petition of the railroad company which sought to recover express rates for carrying gold from Philadelphia to Boston, speaking through Mr. Justice Holmes, said:

> The claimant admitting that it could not demand additional pay for hauling the mails, *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, argues that the transaction was not "mail service" such as it had contracted to perform or within the

classification of mail matter. It urges that in view of the weight limit, 11 pounds, in force July 1, 1913, when its four-year term began; the weight of these bags, 18¾ pounds; of the contents, gold; and of the fact that the bags were sealed and placed in locked pouches, the Postmaster General could not make the service mail service if he tried. We think it unnecessary to discuss the argument, if there is anything in it. The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service, and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, the claimant does not better its case.

II

IF THEY WERE OF ANY CONCERN WHATEVER TO THE ILLINOIS CENTRAL, THE TRANSACTIONS BETWEEN THE UNITED STATES AND ITS CONTRACTORS CONCLUSIVELY SHOW THAT THE TITLE TO THE PROPERTY VESTED IN THE GOVERNMENT F. O. B. POINT OF SHIPMENT AND ITS RIGHT TO INSPECT AND REJECT AT POINT OF DELIVERY DID NOT CHANGE ITS OWNERSHIP OF THE PROPERTY IN TRANSIT

It does not appear that a single shipment was ever rejected at destination. On the contrary, all shipments were received at point of delivery and the purchase price paid according to the contract. If, after inspection, the Government had rejected any article at destination, payment therefor would simply

have been refused and the consignor left with the article on his hands at that point. The number of shipments in the instant case indicates that the practice is general on the part of the Government officers. They openly published that shipments were so handled in order that the Government might get the benefit of land-grant deductions. Probably for that reason the Illinois Central makes no charge of fraud, misrepresentation, deceit, or suppression of material facts. If the Government owned this property, it was entitled to land-grant deductions. If the Government did not own this property, how may any freight charge whatever, with or without land-grant deductions, be claimed against it? How may the Illinois Central bring suit against the Government to recover the equivalent of the land-grant deductions to meet the full tariff charge and at the same time allege that the Government was not owner and shipper of this property? If the title was not in the Government it certainly was in the consignors and the Government was not liable for anything.

In *Hatch* v. *Oil Company*, 100 U. S. 124, 134, 135, Mr. Justice Clifford, speaking for the court, said:

> Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties (citing cases).
>
> "There is no rule of law (quoting Blackburn, J., in *Calcutta Co.* v. *De Mattos*) to prevent the

parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them *whether delivered at the port of destination or not, this intention is effectual.*"

* * * * *

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous, and decisive. * * *

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, *the title passes*, although there remains something to be done in order to ascertain the total value of the goods specified in the contract.

The very fact that the property was delivered to the carrier f. o. b. at the mines, mills, and factories of the contractors and shipped to defendant on regular Government bills of lading, which recited that the articles were "Government property," is conclusive proof of the ownership in the Government from the time of receipt by the carrier.

On delivery of the property by the contractors to the carrier f. o. b. cars at the mines and mills and shipment on regular Government bills of lading,

which is the inflexible rule in the movement of Government property, the title thereto vested immediately in the Government.

> It is the general rule in the ordinary course of mercantile transactions that a delivery to a carrier for shipment is a delivery to the consignee, i. e., it is delivery to the carrier as agent of the consignee, and the property in the goods vested in the latter from the moment of such delivery.
>
> *The Carlos F. Roses*, 177 U. S. 655, 663.
> *Oil Company* v. *Van Etten*, 107 U. S. 325,333.
> *Halliday* v. *Hamilton*, 11 Wall. 560.

Illinois Central contends that because the Government reserved the right to make final inspection, take samples, and make analysis of the property at the points of destination, notwithstanding all prior inspections at the points of shipment, title remained in the contractors while the property was being transported over carrier's lines and continued in them until the right had been exercised and the property finally accepted.

The provisions in the specifications, proposals, and contracts as to the right of the Government to inspect, either at the mines, mills, and factories or at points of destination, as a basis for determining the price to be paid did not in any degree affect the passing of the title to the property to the Government.

In *Gibson* v. *Stevens*, 49 U. S. 383, 399, this court said:

> This mode of transfer and delivery has been sanctioned in analogous cases by the courts

> of justice in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. * * * The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were incapable of actual delivery; consequently, the delivery of the evidences of title, with the order to the bailees indorsed on them, passed the title and possession to the plaintiff.

In purchasing this property the agents of the United States undertook to protect the interests of the Government by having placed in the contracts a clause which provided that any articles of property not coming up to requirements of the specifications and proposals might be rejected, and to determine whether or not the property did meet the requirements provisions were made for inspection, sampling, and analysis. These provisions were equivalent to an option to rescind and return.

In *Guss* v. *Nelson*, 200 U. S. 298, 302, this court said:

> While an option is given by the contract, and the price paid for the option is named,

> yet it contains other clauses which are equally binding and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Massachusetts, 198, 200, quoted approvingly by this court in *Sturm* v. *Baker*, 150 U. S. 312, 329:
>
> "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In *Pope* v. *Allis*, 115 U. S. 363, 372, which involved the question of the right to inspect and reject a consignment of iron shipped f. o. b. cars Milwaukee, this court said:

> And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer* v. *Smith*, 1 B. & C. 1; *Magee* v. *Billingsley*, 3 Ala. 679.

In *Pierson* v. *Crooks*, 115 N. Y. 539, 548, in a similar case involving the right of inspection and rejection of a shipment of iron delivered f. o. b.

carrier at Liverpool, Mr. Justice Andrews in speaking for the court said:

> * * * where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, * * *.

Citing *Pope* v. *Allis*, 115 U. S. 363, Mr. Justice Andrews continued (p. 549):

> The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to purchasers, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered.

CONCLUSION

The judgment of the Court of Claims was right, and should be affirmed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
v.
THE UNITED STATES.

No. 248.

MOTION OF APPELLANT TO REMAND TO COURT OF CLAIMS FOR AMPLIFICATION OF FINDINGS OF FACT.

BENJAMIN CARTER,
Attorney for Appellant.

IN THE

Supreme Court of the United States

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
v.
THE UNITED STATES.

No. 248.

MOTION OF APPELLANT TO REMAND TO COURT OF CLAIMS FOR AMPLIFICATION OF FINDINGS OF FACT.

The appellant by its attorney shows to the court the following facts:

1. Parts of the findings of fact made by the Court of Claims in this case viz., paragraph III, appendix A (Record, pp. 4, 9, 10, 11), relate to coals obtained by Government officers from producers or dealers for use in river improvements in the vicinity of Dubuque, Iowa, and the same were obtained under contracts which permitted the Government officers, upon delivery of the coals at Dubuque, to reject them because of excess of volatile matter or sulphur or because of yielding, upon test, excessive clinkerage or for other reason proving to be undesirable fuel.

2. Other parts of said findings of fact, viz., paragraph V, appendix A (Record, pp. 5, 11, 12), relate to coals similarly obtained for use in improvements of the Missouri River. The coals were obtained under contracts which required that the dealers deliver the same into barges belonging to them, navigated on said river, and should remain on said barges until the progress of the work should require withdrawals therefrom, and that no demurrage, rental or other charges should be paid by the United States for such use of the barges.

3. Findings setting up said matters were proposed in appellant's request for findings of fact, upon which the case was heard by the Court of Claims, but the findings as made by the court say nothing on either of these subjects. After the judgment appellant, by leave of the court, filed a motion with brief for amendment of the findings, so as to include said facts; but the court denied the motion.

4. Attached hereto as Exhibit A is a copy of said motion of appellant purporting to quote provisions of the contracts relative to said matters.

5. There was no evidence before the court on said matter except such contracts.

Appellant deems that said features of said contracts are material evidence on the question of the title to the freights while in transit. It moves that this court remand the case to the Court of Claims with directions that it (a) determine whether said contracts contained in said motion are true quotations from the papers constituting such contracts and, if so, it (b) add the same, by proper reference, to its said findings of fact, and that (c) it find

how, if in any way, said contracts, or any of them, was construed and applied by any of the responsible officers of the United States on the question of paying the sellers for coal shipped, if any, which did not reach destinaton.

BENJAMIN CARTER,
Attorney for Appellant.

District of Columbia, ss:

Before me this day appeared Benjamin Carter, whose name is signed as attorney to the foregoing motion, made oath that all of the statements contained in said motion are true.

Subscribed and sworn to before me, this 18th day of April, 1924.

JESSE L. CONWELL,
Notary Public.

EXHIBIT A

IN THE COURT OF CLAIMS

THE ILLINOIS CENTRAL RAILROAD COMPANY,
v.
THE UNITED STATES. } No. 33955.

MOTION OF CLAIMANT TO AMEND FINDINGS OF FACT

Claimant by its attorney moves that the court will amend as below its findings of fact filed, when judgment was entered dismissing the petition, on May 1, 1922. Appendix A.

I. Instead of "cause for rejection" on page 7, insert: "19. Coal containing percentages of volatile matter or sulphur higher than the limits indicated under 'description of coal desired,' or having a moisture content in excess of that guaranteed, or containing percentages of ash greater than indicated in the column 'maximum limits for ash' in the table in the section entitled 'price and payment,' or failing to give satisfactory results because of excessive clinkering, or proving for any other cause to be an undesirable fuel, will be subject to rejection, and the Government will have the right to cause the contractor to remove such coal at no cost to the Government." Page 12.

II. Insert next before the caption "XIV Delivery, etc.," the following:

27. Alternate bids will be considered for furnishing the quantities and qualities of bituminous lump coal and screenings named in the foregoing specifications, and subject to the said specifications in every respect, except that delivery shall be made on barges in the manner and to the localities hereinafter named.

III. After table of localities and distances on page 12 insert the following:

(c) After delivery the contractor's barges will be retained and used by the United States for the purpose of storing the coal until required for use and of transporting it from the place of delivery to the place of use. The barges will be unloaded as rapidly as the exigencies of the work permit; but coal will be taken from barges only as required for consumption by the dredges, steamboats, and other plant, and as the rate of coal consumption by the dredges, will depend largely upon the amount of dredging and other work required during the low-water season, no time limit for the return of the barges can be fixed. No demurrage, rental, or other charge will be allowed or paid to the contractor for the use of his barges or for any delay in their return to him.

BRIEF

Each of these proposed inserts is copied from the proposals of the contracts and from claimant's request for findings relative thereto. (Record, pp. 41, 50, 87, 89.)

In the first of these matters the mere caption set out by the court "Causes for rejection" does not indicate that coals could be rejected for any other than absolute physical reasons, the results of tests. In reality the language was that a failure "to give satisfactory results because of excessive clinkering, or proving for any other cause to be an undesirable fuel," would be a ground for rejection. Under these phrases there was an uncontrolled discretion in somebody to make rejections according to his judgment or taste. "Satisfactory" refers to a sub-

jective, not objective condition. Of course the arbiter in this matter was the engineer or some other agent of the Government. Any coal that he elected not to receive as good could be rejected, no matter what its true qualties, or other man's judgment of it, might be.

The two other proposed inserts are more important still. There is nothing in the findings to indicate that the Government did not receive the coals from the shippers at the end of the railroad haul. In reality, as the proposed additional matter shows, the coals were to be loaded from cars, by the shippers, on to the shippers' barges, by which they were carried to the places of use. Until unloaded at those places they were in the shippers' charge and at the shippers' risk. How then can it be questioned that they belonged to the shippers until finally unloaded? If by a storm or other accident any of them had been sunk or drifted away, on whom would the loss have fallen? On the shipper, of course.

Claimant at this stage could hardly expect that if these amplifications are made in the findings, any change of the court's decision and judgment will follow; but the case will be appealed, and claimant trusts that the court will give it for that use the more adequate record which is sought by this motion.

BENJAMIN CARTER,
Attorney for Claimant.

Endorsement.
Filed June 27, 1922.

A true copy.
Test this April 22, 1924.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 248. Argued April 28, 1924.—Decided May 26, 1924.

For the purpose of securing the reduced rates for transportation of its property over land-grant railroads, the Government purchased goods for prices f. o. b. at place of shipment, paid the freight, and had shipment made by the sellers with government bills of lading. *Held*, that title passed at place of shipment, although the contracts of sale reserved to the Government the right of inspection and rejection at the place of destination and imposed certain duties there upon the sellers, and that goods so transported, and accepted by the Government, were entitled to the reduced rates of transportation. P. 213.

57 Ct. Clms. 277, affirmed.

APPEAL from a judgment of the Court of Claims rejecting claims for additional compensation for transportation of freight.

Mr. Benjamin Carter for appellant.

The question is whether freights intended for government uses, but which the Government was under no obligation to accept until after they had reached destination, were, while in transit, "property of the United States" and lawful subjects of transportation rates at which, in virtue of land grants, "property of the United

States" should be transported. This and two other cases of other carriers which are before this Court arose out of the contumacy of disbursing officers in claiming for the Government a privilege which had been denied to it by repeated decisions of the Comptroller of the Treasury. That officer had first ruled in favor of the carriers in cases where commercial bills of lading had been used. The first device, then, of officers making shipments, was to require the use of government bills of lading; but the Comptroller held that the rights of the parties were not affected by this detail. Some overzealous officers then had recourse to a form of purchase from producers of the materials by which purchase prices applied at the points of shipment. The shipments were on government bills of lading; but specific stipulations were (1) that, although the Government would pay, or advance, the freight charges, the shipper would be responsible for the shipment, including demurrage charges which might be incurred, and (2) that examination, in one form or another, would be made by the Government's officers after delivery at, or beyond, points of destination, that nothing would be accepted which did not successfully pass this test and that shippers would remove rejected materials and repay the transportation charges on those quantities.

Assuming, from the fact that government bills of lading were used and the fact, in some instances, that the shipper, as well as the consignee, was a government officer, appellant, upon delivering the freights, rendered and collected its bills at land-grant rates. Thereafter, it received intimations regarding the terms of the contract under which the shipments were made and, upon investigation, ascertained the facts here stated.

Land-grant rates are not lawfully applicable to any transportation, even though procured by officers of the United States, except of property of the United States.

Supplies ordered by and shipped to authorized officers of the United States, who were to test or inspect them, at or beyond destinations, and thus determine whether to reject or accept them, did not, while in course of transportation, belong to the United States.

The fixing of purchase prices to apply at points of shipment does not effect a transmission of title to commodities from the producers to the United States if the acceptance of the supplies by the United States depended, by contract, upon questions to be determined by its officers at or beyond destinations of the shipments.

The mere payment of freight charges by a consignee does not divest title to the freights out of the shipper and vest it in the consignee. *Clarkson* v. *Stevens,* 106 U. S. 505; *Gorman* v. *Kennedy,* 126 Mich. 182; *Smart* v. *Batchelder,* 57 N. H. 140; *Cornell* v. *Clark,* 104 N. Y. 451; *Smith* v. *Wisconsin Investment Co.,* 144 Wis. 151; *Wagar* v. *Farren,* 71 Mich. 370; *Pike* v. *Baughn,* 39 Wis. 499; *Blodgett* v. *Hovey,* 90 Mich. 571.

That the Government, by the practice here concerned, obtains the same benefit that would have followed from taking title at points of shipment on land-aided lines and paying land-grant rates, is immaterial. *United States* v. *Union Pacific R. R. Co.,* 249 U. S. 354; *Alabama Great Southern R. R. Co.* v. *United States,* 49 Ct. Clms. 522; *Louisville & Nashville R. R. Co.* v. *United States,* 50 Ct. Clms. 414; 54 Ct. Clms. 161.

The only practical effect of the use made of government bills of lading is to give this Court jurisdiction of transactions more than six years old at the time the suit was instituted. This misapplication by government officers of a government form was a legal fraud upon the railroad company; and, according to the adjudications in like cases, time did not begin to run against the assertion of the railroad's claim so long as its officers were in ignorance of the real facts. *Exploration Co.* v. *United States,* 247 U. S. 435.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery. Or to state the question another way, whether the shipments while in transit were the property of the United States and properly transported at land-grant rates, or did not become the property of the United States until after receipt at destination and subject to commercial rates. The latter is the contention of the Railroad Company, although it rendered bills for and accepted payment of them upon the other view. Its explanation is, it believed that that view was correct, that is, believed the shipments were the property of the United States, and, so believing, rendered bills for $40,000 less than it was entitled to, and, so believing, accepted payment of them. For that $40,000, this action was brought. The Court of Claims decided against the Railroad Company and dismissed its petition.

There is no contest of the findings or of the decision of the Court of Claims other than that expressed in the contention above stated.

It appears from the findings that the Railroad Company is a corporation and in the operation of a system of railways, those on which the shipments with which this case is concerned were transported. Three of the railways of the system were constructed with the aid of public lands granted by Congress.

The shipments consisted of certain articles for use in government improvements of the Missouri River.

The contention seems to be that the shipments were to be tested or inspected at or beyond destinations and accepted or rejected there, but while in course of transportation were not to belong to the United States. To sustain this view, *Clarkson* v. *Stevens,* 106 U. S. 505, is cited. The case does not sustain the contention. It was decided that the intention of the parties was determinative, not an arbitrary rule of construction. In the case at bar the findings of the court demonstrate that the Government especially intended to avail itself of the fact that the shipments were to be transported over land-grant roads, and that it was entitled to deductions from the commercial rates.

The years of the shipments and the roads over which they were to be transported are given in Finding V, and the finding recites: "These materials and supplies were all purchased on invitation to bidders, proposals of bidders, and vouchers, on which payments were made to the sellers. The form of invitation on which bids were made invariably read: 'The prices will be for the articles delivered f. o. b. cars at [the place of shipment]. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any responsibility as shipper that would attach if the delivery had been at destination.' This form of invitation was only used over land-grant or bond-aided roads, and was never used where delivery was to be made at point of use."

And the finding states that "The shipments were all made on Government bills of lading, which were accomplished, the articles inspected, and accepted at points of use by the proper Government officials."

We agree with the Court of Claims that "the United States and the contractors were privileged to write into their contract such terms as they saw fit" and that "pro-

visions for a final inspection at point of delivery or for the rendering of a further service by the contractor at that point were not inconsistent with and could not be invoked to nullify a specific provision under which the title to the property passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable." See *Hatch* v. *Oil Company*, 100 U. S. 124, 134, 135.

As we have seen the Railroad Company made land-grant deductions from commercial rates in the bills it rendered. It does not now show fraud or mistake of fact; its only excuse is that its "officers believed that the shipments belonged to the United States." It is not charged that the belief was engendered by any practices or artifices of the officers of the United States. And it seems to have had continuity for a long time. A finding of the Court of Claims is that "part of the claim presented, amounting to $2,511.68, relating to shipments from October 30, 1911, to March 7, 1912, was barred by the statute of limitations when this suit was commenced, March 23, 1918."

The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The incidental regulations between it and the contractors cannot divest that ownership in the interest of the Railroad Company.

Judgment affirmed.